163-U S 273

TRANSCRIPT OF RECORD.

163-273

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 260.

FRANK HANFORD, APPELLANT,

vs.

GRIFFITH DAVIES AND ISABELLA DAVIES, HIS WIFE, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

FILED AUGUST 10, 1893.

(15,372.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 26, 1895.

a In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Judicial Circuit.

FRANK HANFORD, Plaintiff,
v.
GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; THOMAS Prosch and Virginia Prosch, His Wife; John H. McGraw and May McGraw, His Wife, Sued Herein as John Doe and Mary Doe, His Wife, and Frederick W. Wald and Emma C. Wald, His Wife, Sued Herein as Richard Roe and Susan Roe, His Wife, Defendants.

Transcript.

1 In the Circuit Court of the United States for the District of Washington, Northern Division.

FRANK HANFORD, Plaintiff,
against
GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; Thomas W. Prosch and Virginia Prosch, His Wife; John Doe and Mary Doe, His Wife, and Richard Roe and Susan Roe, His Wife; the True Names of said Last Four Named Defendants Being Unknown, Defendants. } No. 89. In Equity.

To the honorable judges of the circuit court of the United States for the district of Washington:

Frank Hanford, of the city of Seattle and a citizen of the State of Washington, brings this his bill against Griffith Davies and Isabella Davies, his wife; Thomas W. Prosch and Virginia Prosch, his wife; John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife, all of the city of Seattle and citizens of the State of Washington.

And thereupon your orator complains and says—

I. That your orator at all the times herein mentioned had, now has, and for a long time prior hereto has had a valid subsisting interest in and a right to the possession as owner in fee of the following-described land, situate in the city of Seattle, county of King and now State of Washington, to wit:

Commencing at a stake on the south boundary line of E. Hanford's donation claim, thence east eighty (80) rods, thence north
2 forty (40) rods, thence west eighty (80) rods, thence south forty (40) rods to the place of beginning, containing twenty acres of land.

II. That the value of said land in controversy in this suit exceeds eight thousand dollars.

III. That on the 14th day of October, 1878, for valuable consideration to it paid, the Territory of Washington executed and de-

livered to Thaddeus Hanford its deed and thereby conveyed to said Thaddeus Hanford, his heirs and assigns, the above-described premises in fee-simple; which said deed was duly recorded in the office of the auditor of King county, Washington Territory, on the 25th day of November, 1878; which said deed was executed by said Territory of Washington in pursuance of a sale of said land made by said Territory of Washington as the property of one Lumley Franklin for the non-payment of taxes due thereon by said Lumley Franklin, and which said deed executed by said Territory of Washington as the party of the first part to said Thaddeus Hanford as the party of the second part contained the following contract and agreement between said parties thereto, to wit:

"Now therefore, the said party of the first part by virtue of the statute in such case made and provided, for the consideration of the sum of money above mentioned paid to the county treasurer of said county, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said Thaddeus Hanford, his heirs and assigns the said described real estate, together with all and singular the tenements and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof, as well in law as in equity, and the right, title and interest of the said Lumley Franklin and all
3 owners known or unknown, of, in or to the above-described premises."

IV. That the said Thaddeus Hanford immediately entered into possession of said premises, paid taxes thereon, improved the same, and remained in possession until the 17th day of September, 1885, when he sold the same to your orator as hereinafter set forth.

V. That the statutes of Washington Territory in force at the date of said tax sale and at the date of the execution of said tax deed by said Territory to said Thaddeus Hanford prohibiting the bringing of any suit or proceeding for the recovery of land sold for taxes after the expiration of three years from the date of the recording of the tax deed of sale, except in cases where the tax had been paid or the land redeemed or where such suit was brought by the purchaser at such tax sale, and provided that the tax deed should be presumptive evidence of the regularity of all former proceedings.

VI. That on the 17th day of September, A. D. 1885, more than three years after the recording of his said tax deed in the office of the auditor of King county, said Thaddeus Hanford, while in possession of said land, in good faith and for a valuable consideration to him paid by Frank Hanford, executed to said Frank Hanford a deed of said described premises and thereby conveyed said premises in fee to your orator; which said deed was duly recorded in the office of the auditor of King county on the 13th day of March, 1886.

VII. That your orator purchased said land from said Thaddeus Hanford in good faith for valuable consideration and without notice of any claim to said land by any person other than said Thaddeus Hanford, and in making said purchase your orator relied upon the

express contract entered into between the Territory of Wash-
4 ington and the said Thaddeus Hanford, above set forth, by virtue of which said land was conveyed to said Thaddeus Hanford and title thereto confirmed in him by said Territory and the laws thereof then existing.

VIII. That immediately thereupon your orator entered into possession of said land and thereafter improved the same, paid the taxes thereon, erected a dwelling-house thereon and held the same for rent, and stored therein the property of his agent and employee.

IX. That on the 26th day of July, 1887, the said Territory of Washington, by W. Finley Hall, its agent, presented the petition of the said W. Finley Hall to the probate court of King county, alleging the death of said Lumley Franklin above named; that he left no property in Washington Territory except real estate; that there were no general creditors; that said Franklin was a resident of Victoria, British Columbia, and that he died without the Territory of Washington, and prayed that letters of administration be granted to said W. Finley Hall upon the estate of said Lumley Franklin, but said W. Finley Hall was not of kin to said Lumley Franklin, neither was he a creditor of said Franklin, nor did he act in presenting said petition at the request of any one of kin to said Lumley Franklin or at the request of any of the creditors of said Lumley Franklin.

X. That on the 8th day of August said probate court assumed to appoint said W. Finley Hall administrator of said estate, and on the 26th day of said month he filed his inventory showing there were no debts against said estate, no personal assets, and that the said land constituted the sole assets of said estate.

5 XI. That thereafter, to wit, on the 26th day of March, 1888, the said Territory of Washington, by its agent and organ, the probate court of King county, in violation of the contract above mentioned, entered into between said Territory and Thaddeus Hanford, the grantor of your orator, ordered said land above described to be sold as the property of Lumley Franklin to pay a tax claimed by said Territory from said Lumley Franklin, and thereafter, in pursuance of said order, made a pretended sale of said land and caused to be executed a deed purporting to convey the same to the defendant Griffith Davies, in violation of the contract above set forth between the said Territory of Washington and the said Thaddeus Hanford and the obligation thereof and in violation of article 1, section 4, of the Constitution of the United States and of section- 1851 and 1891 of the Revised Statutes of the United States.

XII. That in all of his actions the said W. Finley Hall acted as the agent and instrument of said Territory of Washington, and in all of its proceedings the said probate court acted as the agent and organ of said Territory for the purpose of collecting said tax claimed by said Territory from said Lumley Franklin; that in all of its said proceedings the said probate court acted entirely without jurisdiction and without color of authority save as the agent and

organ of said Territory, and said probate court and said W. Finley Hall as the agents and organs of said Territory were at the time of their said proceedings fully aware that said land had in good faith and for valuable consideration been sold by said Territory to said Thaddeus Hanford as the property of said Lumley Franklin for the non-payment of taxes thereon by said Lumley Franklin,
6 and that upon the faith of said sale and the deed executed in pursuance thereof your orator had purchased said land in good faith for valuable consideration and without notice of any claim on the part of said Territory or any person whomsoever from the said Thaddeus Hanford.

XIII. That the deed of said land executed in pursuance of said sale ordered by said probate court was taken in the name of the defendant Griffith Davies, but said deed is in fact held for the benefit of the said Griffith Davies and wife, Thomas W. Prosch and wife, and certain other persons whose true names are to your orator unknown, and who are therefore in this bill named as John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife.

XIV. That the said defendants in purchasing at said sale and when they received said deed had actual and constructive notice of the title of your orator to said land and of all the facts and circumstances connected therewith, but, in spite of their knowledge and with intent to create a cloud upon the title of your orator to the said land and to force your orator to buy off the adverse claim which said defendants expected to acquire by virtue of said sale and the deed executed in pursuance thereof, conspired together to purchase said land, and in pursuance of said conspiracy did buy in said land at the *a* pretended sale thereof and procured a deed for the same, and thereafter, to wit, on the 25th day of February, 1889, forcibly entered upon said land and forcibly took possession of said dwelling-house of your orator and maintained said forcible possession until the 1st day of April, 1891, when they vacated the actual possession of said premises, and the same are now in the
7 actual possession of no one, except so far as said abandonment restores the prior possession of your orator.

XV. That the defendants are married persons, and as such set up their pretended claim of title; that the pretended deed of the defendants is of no validity in law or equity and is a cloud upon the title of your orator to said land; that the defendants have no estate, right, title, or interest in said land or the possession thereof, nor have either of them by virtue of said deed or otherwise, and their claim of title is without any right whatever.

Forasmuch as your orator can have no adequate relief except in this court, and to th*at* end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed and may make a full disclosure and discovery of *of* all the matters aforesaid and according to the best and utmost of their knowledge, remembrance, information, and belief full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived;

And that on the hearing of this cause all adverse claims which said defendants or either of them — may be determined by a decree of this court;

That it may be adjudged and declared that the defendants have no title, interest, or estate in or to said land or any part thereof, and that the title of your orator thereto is good and valid; that the defendants and each of them be forever enjoined and debarred from asserting any title or claim to said land adverse to your orator; that said administrator's deed may be declared invalid and the recording thereof of no effect, and for such other and further
8 relief as the equity of the case may require and to your honors may seem meet—

May it please your honors to grant unto your orator a writ of subpœna of the United States of America, directed to said defendants, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

J. C. HAINES,
HOWE & CORSON,
Solicitors for Complainant, Burke Block and
14 Colman Building, Seattle, Washington.

STATE OF WASHINGTON, }
County of King, } *ss:*

Frank Hanford, being duly sworn, says that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true, and that he is the complainant in this action.

FRANK HANFORD.

Sworn to and subscribed before me this 9th day of June, 1891.

A. E. HANFORD,
[SEAL.] *Notary Public for the State of Washington,*
Residing at Seattle.

Endorsed: Bill of complaint. Filed June 9, 1891, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

9 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Washington. In Equity.

The President of the United States of America to Griffith Davies and Isabella Davies, his wife; Thomas W. Prosch and Virginia Prosch, his wife; John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife, the true names of said last four named defendants being unknown, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room, in Seattle, King Co., Wash., on the 6th day of July, A. D. 1891, to answer

a bill of complaint exhibited against you in said court by Frank Hanford, who is a citizen of the State of Washington, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 9th day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the 115th.

[SEAL.]

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of July next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

10 Endorsed.

UNITED STATES MARSHAL'S OFFICE, }
District of Washington. }

I hereby certify that I received the within writ on the 9th day of June, 1891, and personally served the same on the 10th day of June, 1891, by delivering to and leaving with the within-named Griffith Davies and Isabella Davies, his wife, at Seattle, said defendant- named therein, personally, at the said county of King, in said district, a copy thereof.

THOMAS R. BROWN,
U. S. Marshal,
By H. A. BIGELOW, *Deputy.*

June 10th, 1891.

U. S. Marshal's Fees.

Serving subpœna on Griffith Davis	$2 00
Isabella Davis	2 00
Mileage, 4 miles, at 6c.	24
	$4 24

Subpœna filed June 13, 1891, in the U. S. circuit court.

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS, *Deputy.*

11 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Washington.

The President of the United States of America to Griffith Davies and Isabella Davies, his wife; Thomas W. Prosch and Virginia Prosch, his wife; John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife, the true names of said last four named defendants being unknown, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room, in Seattle, King Co., Washington, on the sixth day of July, A. D. 1891, to answer a bill of complaint exhibited against you in said court by Frank Hanford, who is a citizen of the State of Washington, and to do and receive what the said court shall have considered in that behalf, and this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 9th day of June, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the 115th.

[SEAL.] A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS, *Deputy*.

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of July next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

A. REEVES AYRES, *Clerk*,
By R. M. HOPKINS,
Deputy Clerk.

12 UNITED STATES MARSHAL'S OFFICE, }
District of Washington. }

I hereby certify that I received the within writ on the 9th day of June, 1891, and personally served the same on the 10th day of June, 1891, by delivering to and leaving with the within-named Thomas W. Prosch and Virginia Prosch, his wife, at Seattle, said defendant- named therein, personally, at the said county of King, in said district, a copy thereof.

THOMAS R. BROWN,
U. S. Marshal,
By H. A. BIGELOW, *Deputy*.

June 10th, 1891.

U. S. Marshal's Fees.

Serving subpœna on Thomas W. Prosch	$2 00
Virginia Prosch	2 00
Mileage, 4 miles, at 6c	24
	$4 24

Endorsed: Subpœna. Filed June 13, 1891, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

13 United States Circuit Court for the District of Washington.

FRANK HANFORD, Plaintiff,
vs.
GRIFFITH DAVIES *et al.*

To the clerk of the above-entitled court:

You will please enter our appearance as attorneys for plaintiffs in the above-entitled cause.

J. C. HAINES,
HOWE & CORSON.

Endorsed: Filed June 9, 1891. A. Reeves Ayres, clerk. R. M. Hopkins, deputy clerk.

14 In the Circuit Court of the United States for the District of Washington, Northern Division.

FRANK HANFORD, Plaintiff,
vs.
GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; THOMAS Prosch and Virginia Prosch, His Wife; John H. McGraw and May McGraw, His Wife, Sued Herein as John Doe and Mary Doe, His Wife, and Frederick W. Wald and Emma C. Wald, His Wife, Sued Herein as Richard Roe and Susan Roe, His Wife, Defendants.

In equity.

To the clerk of said court:

In the above cause please enter the appearance of Griffith Davies and Isabella Davies, Thomas Prosch and Virginia Prosch, John H. McGraw and May McGraw, and Frederick Wald and Emma C. Wald, defendants, and of myself as their solicitors, as of the date of the filing hereof.

JUNIUS ROCHESTER,
Solicitor for Def'ts.

Endorsed: Filed July 6, 1891, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

15 In the Circuit Court of the United States for the District of Washington, Northern Division.

FRANK HANFORD, Plaintiff,
vs.
GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; Thomas Prosch and Virginia Prosch, His Wife; John H. McGraw and —— McGraw, His Wife, Sued Herein as John Doe and Mary Doe, His Wife, and Frederick W. Wald and Emma C. Wald, His Wife, Sued Herein as Richard Roe and Susan Roe, His Wife, Defendants. } No. 89.

In equity.

The demurrer of Griffith Davies and Isabella Davies, Thomas Prosch and Virginia Prosch, John H. McGraw and May McGraw, Frederick Wald and Emma C. Wald.

These defendants, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, do demur to said bill for that—

1st. The same does not state such a case nor contain any matter of equity entitling the complainant to any relief against the defendants.

2nd. This honorable court has no jurisdiction in the premises.

Wherefore they pray the judgment of the court whether they shall be compelled to further answer said bill, and further pray to be dismissed with their costs.

JUNIUS ROCHESTER,
Solicitor for Defendants.

16 I, Junius Rochester, of counsel for the defendants in the above cause, do hereby certify that the foregoing demurrer to the bill of complaint is, in my opinion, well founded in law.

JUNIUS ROCHESTER.

UNITED STATES OF AMERICA, }
Northern Division of the District of Washington. }

Griffith Davies, defendant in the above cause, being duly sworn, say that the foregoing demurrer to the bill of complaint is not interposed for purpose of delay.

GRIFFITH DAVIES.

Subscribed and sworn to before me this 6th day of July, 1891.

A. REEVES AYRES, *Clerk*,
[SEAL] By R. M. HOPKINS, *Deputy*.

Endorsed: Demurrer. Filed July 6, 1891, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

Received copy of within demurrer July 6, 1891.

HOWE & CORSON.

17 (Circuit Court, Northern Division, District of Washington, June 7, 1892.)

FRANK HANFORD
vs.
GRIFFITH DAVIES *et als.* } No. 89.

1. The prohibition of the Constitution of the United States against the enactment of State laws that shall impair the obligation of contracts applies only to the adoption of a constitution or the enactment or enforcement of a statute or the exercise of some form of legislative power subsequent in time to the contract.

2. Where the land of F. was sold for unpaid taxes and a tax deed was executed therefor and the same land was subsequently sold at probate sale as the property of F. in administering upon his estate, held that the obligation of the contract of the owner of the tax deed was not impaired by the probate sale within the prohibition of the Constitution.

In equity on demurrer to the bill.

Howe & Corson, for complainant; Junius Rochester, for defendant.

GILBERT, *J.*:

The complainant brings suit, alleging in his bill, in substance, that in October, 1878, his grantor acquired from the Territory of Washington a tax title to certain land in King county sold for unpaid taxes as the property of one Lumley Franklin; that possession was taken by complainant's grantor under said tax deed and maintained until the conveyance of the property to complainant, in September, 1885, since which time he has been in possession and made valuable improvements; that on August 8th, 1887,

18 by order of the probate court of King county, an administrator of the estate of said Franklin, then deceased, was appointed, and thereafter, upon petition of the administrator and under the order of the said court, the land in question was sold as the property of said decedent and to pay a tax claimed by the Territory to be due from said Franklin; that said sale was made in violation of the contract whereby the Territory sold said land to complainant's grantor for unpaid taxes; that one of the defendants became the purchaser of said property at the probate sale, and a deed was made to him, in violation of the obligation of said first contract and complainant's grantor and in violation of article 1, sec. 10, of the Constitution of the United States and of sec. 1851 and 1891, U. S. Rev. Stat., which make the provisions of the Constitution applicable to the Territories; that by the law in force at the time complainant's tax title was acquired the tax deed was made presumptive evidence of the regularity of all former proceedings, and suit for the recovery of the property was prohibited after the expiration of three years from the date of recording of the deed except in cases where the tax had been paid or the land redeemed;

that the defendants had notice of the complainant's rights, and their administrator's deed was procured in pursuance of a conspiracy to deprive him of said property, and said property is worth $8,000.00. The prayer of the bill is that the administrator's deed be declared invalid, and that the defendants be enjoined from asserting any claim to said premises.

A demurrer to the bill raises the question of the jurisdiction of this court.

The only ground of jurisdiction claimed by the complain-
19 ant is the Federal question involved in the allegation of the bill that the probate proceedings, sale, and conveyance are in violation of article 1, sec. 10, of the Constitution of the United States. That provision of the Constitution inhibits the enactment of State laws that shall impair the obligations of contracts. It protects the obligation of contracts only so far as may be affected by legislation.

The limit of the protection of the Constitution is well defined by Mr. Justice Gray as follows: "In order to come within the provisions of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State and not at the decision of its courts or the acts of administrative boards or officers."

New Orleans Waterworks Co. *vs.* Louisiana Sugar Refining Co., 125 U. S., 18–30. In Railroad Company *v.* Rock, 4 Wall., 177, Mr. Justice Miller said: "It must be the constitution or some law of the State which impairs the obligation of the contract or which is otherwise in conflict with the Constitution of the United States, and the decision of the State court must sustain the law or constitution of the State in the matter in which the conflict is supposed to exist, or the case for this court does not arise."

While there has been no deviation by the Supreme Court from the doctrines of these cases, it has been held that the legislation prohibited by the constitution need not be in the form of a statute enacted by the legislature or a constitution adopted by the people. It may be the exercise of legislative power delegated by the legislature to a municipal corporation—United States *v.* New Orleans,
20 98 U. S., 381—and it may apply to an enactment, from whatever source derived, to which the State gives the force of law. Williams *v.* Breffy, 96 U. S., 176.

The bill in this case refers to no law enacted or enforced by the Territory of Washington that comes within the prohibition of the constitution. Complaint is made, not of the laws, but of the action of the probate court, the administrator, and the defendants. The allegations are that the impairment of complainant's contract occurred through the wrongful or erroneous administration of laws that are not alleged to be unconstitutional.

The probate sale, it is true, was made to pay a tax. The assessment of a tax is a legislative act, and it has been held that the provision of the constitution under consideration is a limitation upon

26 In the Circuit Court of the United States for the District of Washington, Northern Division.

FRANK HANFORD, Complainant, Appellant,
vs.
GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; THOMAS Prosch and Virginia Prosch, His Wife; John Doe and Mary Doe, His Wife, and Richard Roe and Susan Roe, His Wife, Defendants, Respondents. } 89.

Petition for Allowance of Appeal.

The above-named complainant, Frank Hanford, conceiving himself aggrieved by the judgment of the above-entitled court, entered on the 3rd day of September, 1892, in the above proceeding, doth hereby appeal from said judgment to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

JAS. B. HOWE,
Solicitor for the Complainant and Appellant, Frank Hanford.

52 Haller block, Seattle, Washington.
Dated June 2nd, 1893.

And now, to wit, on the 2nd day of June, 1893, it is ordered that the appeal be allowed as prayed for.

C. H. HANFORD,
District Judge, Presiding in the Circuit Court.

Endorsed: Petition for allowance of appeal. Filed June 2, 1893, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

27 In the Circuit Court of the United States for the District of Washington, Northern Division.

FRANK HANFORD, Complainant, Appellant,
vs.
GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; THOMAS Prosch and Virginia Prosch, His Wife; John Doe and Mary Doe, His Wife, and Richard Roe and Susan Roe, His Wife, Defendants, Respondents. } No. 89.

Assignment of Errors.

Now comes the complainant and appellant and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the bill of complaint of the complainant, the appellant herein, stated a cause within the jurisdiction of the circuit court of

the United States for the district of Washington, and said court erred in holding that it had no jurisdiction of said cause.

II.

That said circuit court of the United States for the district of Washington erred in not holding that the bill of complaint of the complainant herein showed upon its face a cause of action within the jurisdiction of said court, because it appeared in said bill that the Territory of Washington had enacted a law impairing the obligation of a contract entered into between said Territory and the complainant in this action.

III.

That said court erred in not holding that the bill of complaint of complainant herein alleged facts showing that said complainant had been deprived of his property without due process of law.

28 IV.

That said court erred in not holding that the title of the complainant to the premises described in his said bill of complaint has become an absolute and indefeasible title, and that the decision of the probate court of King county, in the Territory of Washington, was in effect a law of the Territory of Washington impairing the obligation of the contract entered into by said Territory and the complainant herein and complainant's grantor, and was forbidden by section one of article X of the Constitution of the United States and by the laws of the United States.

V.

That said court erred in not holding that if the decision of the probate court of King county, in the Territory of Washington, was not a law impairing the obligation of a contract entered into between said Territory and the complainant herein, the giving effect to said decision by the officers of said Territory, whereby complainant was deprived of said property, was depriving complainant of his property without due process of law, was a denial of the equal protection of the laws to complainant, and was a violation of his rights under the Constitution of the United States.

VI.

That said court erred in not holding that the decision of the probate court of King county, of the Territory of Washington, and the giving effect thereto by the officers of said Territory was depriving complainant of a vested right to the premises described in his bill of complaint.

VII.

29 That said court erred in not holding that the statute of limitations of the Territory of Washington in force at the date that said Territory executed a deed of the premises de-

scribed in complainant's bill of complaint to the grantor of complainant herein having been taken by said Territory from the State of Wisconsin after said law of said State of Wisconsin had been interpreted by the supreme court of said State of Wisconsin and by the Supreme Court of the United States, said interpretation of said law by said courts became a part of the law of the Territory of Washington, and the complainant's grantor having purchased said property upon the faith of said contract and of said law in force at the date of said contract a subsequent decision of the court of the Territory of Washington conflicting with and in effect overruling said decisions was a law of the Territory of Washington impairing the obligation of the contract.

VIII.

That said court erred in not holding that the ordinance of July 15th, 1887, entitled "An ordinance for the government of the territory of the United States northwest of the river of Ohio," being the law of the Territory of Washington by reason of the extension of said ordinance to said Territory by acts of the Congress of the United States, a decision of the probate court of King county, in the Territory of Washington, annulling said contract between said Territory and complainant, was a law of said Territory impairing the obligation of said contract.

IX.

That said court erred in not holding that the code of Washington Territory of 1881 was a law of the Territory of Washington enacted after the making of the tax deed from said Territory to complainant's grantor and the construction of said code by the probate
30 court of King county, whereby the said tax deed was annulled, was a law of said Territory impairing the obligation of a contract and void.

X.

That said court erred in not holding that it appearing upon the face of complainant's bill of complaint that the Territory of Washington, having sold to complainant's grantor the premises described in the complaint and having in the deed executed to plaintiff's grantor, covenanted that all the right, title, and interest of all owners, known or unknown, in or to said premises were sold to plaintiff's grantor, the subsequent sale of said premises for taxes assessed prior to the date of said sale against a person other than plaintiff's grantor or any one claiming under him was a law impairing the obligation of the contract entered into between said Territory and the plaintiff's grantor and was in effect depriving the plaintiff of his property without due process of law.

Wherefore said Frank Hanford prays that the judgment and decree of the circuit court of the United States for the district of Washington, northern division, be reversed and that the defend-

ants be required to answer complainant's bill of complaint filed in said court.

JAMES B. HOWE,
Solicitor for Appellant, 52 Haller Block,
Seattle, Washington.

June 2nd, 1893.

Endorsed: Assignment of errors. Filed June 2, 1893, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

31 In the Circuit Court of the United States for the District of Washington, Northern Division.

FRANK HANFORD, Complainant and Appellant, *vs.* GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; Thomas Prosch and Virginia Prosch, His Wife; John Doe and Mary Doe, His Wife, and Richard Roe and Susan Roe, His Wife, Defendants and Respondents.	No. 89.

Know all men by these presents that we, Frank Hanford, as principal, and John B. MacDougall and Clarence Hanford, as sureties, all of the city of Seattle, in the State of Washington, are held and firmly bound unto the above-named Griffith Davies and Isabella Davies, his wife; Thomas Prosch and Virginia Prosch, his wife; John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife, in the sum of one thousand dollars, to be paid to the said Griffith Davies and Isabella Davies, his wife; Thomas Prosch and Virginia Prosch, his wife; John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3d day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas the above-named Frank Hanford has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the
32 circuit court of the United States for the district of Washington, northern division:

Now, therefore, the condition of this obligation is such that if the above-named Frank Hanford shall prosecute said appeal to effect and shall answer for all costs of said appeal if he fail to make said appeal good, then this obligation shall be void: otherwise the same shall be and remain in full force and virtue.

FRANK HANFORD. [SEAL.]
JOHN B. MACDOUGALL. [SEAL.]
CLARENCE HANFORD. [SEAL.]

Sealed and delivered and taken and acknowledged this 3d day of June, 1893, before me—

C. D. EMERY,
United States Commissioner.

[SEAL.]

STATE OF WASHINGTON, } ss:
County of King, }

Personally appeared before me John B. MacDougall and Clarence Hanford, who, being duly sworn, says each for himself that he is a resident of the city of Seattle and State of Washington and is worth the sum of two thousand (2,000) dollars over and above all his debts and liabilities and exclusive of property exempt from execution.

JOHN B. MACDOUGALL.
CLARENCE HANFORD.

Sworn to and subscribed before me this 3d day of June, 1893.

C. D. EMERY,
United States Commissioner.

[SEAL.]

Approved by—

WM. B. GILBERT,
Circuit Judge.

Endorsed: Bond. Filed June 3, 1893, in the U. S. circuit
33 court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy.

34 United States Circuit Court for the District of Washington.

FRANK HANFORD, Appellant, Plaintiff,
vs.
GRIFFITH DAVIES *et al.*, Respondent-, Defendants. } No. 89. Præcipe.

To the clerk of the above-entitled court:

You will please prepare and transmit to the Supreme Court of the United States a complete transcript of the record and proceedings in the above-entitled case.

JAS. B. HOWE,
Solicitor for Appellant.

Endorsed: Præcipe for transcript on appeal. Filed June 23, 1893. A. Reeves Ayres, clerk. R. M. Hopkins, deputy clerk.

35 In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Judicial Circuit.

FRANK HANFORD
v.
GRIFFITH DAVIES and ISABELLA DAVIES, His Wife; THOMAS Prosch and Virginia Prosch, His Wife; John H. McGraw and May McGraw, His Wife, Sued Herein as John Doe and Mary Doe, His Wife, and Frederick W. Wald and Emma C. Wald, His Wife, Sued Herein as Richard Roe and Susan Roe, His Wife.

UNITED STATES OF AMERICA, *District of Washington*, } *ss*:

I, A. Reeves Ayres, clerk of the circuit court of the United States for the district of Washington, ninth judicial circuit, do hereby certify that the foregoing thirty-four typewritten pages, numbering from one to thirty-four, inclusive, is a true copy of the record and of all the proceedings in the above and therein entitled suit, and that the same constitutes the transcript of the record upon appeal to the Supreme Court of the United States.

Seal United States Circuit Court, District of Washington, Northern Division.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 28th day of June, A. D. 1893.

A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington,
By R. M. HOPKINS, *Deputy.*

36 UNITED STATES OF AMERICA, *ss*:

To Griffith Davies and Isabella Davis, his wife; Thomas Prosch and Virginia Prosch, his wife; John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington within sixty days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, wherein Frank Hanford is appellant and Griffith Davies and Isabella Davies, his wife; Thomas Prosch and Virginia Prosch, his wife; John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife, are respondents, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal United States Circuit Court, District of Washington, Northern Division.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-three.

WM. B. GILBERT,
Circuit Judge.

37 *Marshal's Return.*

I hereby certify that I received the within citation this 3rd day of June, 1893, and served the same on Junius Rochester personally by delivering a copy thereof to said Junius Rochester at Seattle, in the State of Washington, he, the said Junius Rochester, being the solicitor of record in the within-entitled case of the defendants therein and of each of them, as appears by the record in said case and the docket of the entitled court.

{Seal United States Circuit Court, District of Washington, Northern Division.}

JAMES C. DRAKE,
U. S. Marshal,
By H. A. BIGELOW, *Deputy.*

Dated Seattle, Wash., June 6th, 1893.

38 [Endorsed:] In the circuit court of the United States for the district of Washington, northern division. Frank Hanford, complainant, appellant, *vs.* Griffith Davies *et al.*, defendants, respondents. Citation. Filed June 6, 1893, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy. James B. Howe, solicitor for appellant, 52 Haller block, Seattle, Wash.

[Endorsed:] No. 89. In the United States circuit court for the district of Washington. Frank Hanford, appellant, *vs.* Griffith Davies *et al.*, appellees. Transcript.

Endorsed on cover: Case No. 15,372. Washington C. C. U. S. Term No., 260. Frank Hanford, appellant, *vs.* Griffith Davies and Isabella Davies, his wife, *et al.* Filed August 10, 1893.

37 *Marshal's Return.*

I hereby certify that I received the within citation this 3rd day of June, 1893, and served the same on Junius Rochester personally by delivering a copy thereof to said Junius Rochester at Seattle, in the State of Washington, he, the said Junius Rochester, being the solicitor of record in the within-entitled case of the defendants therein and of each of them, as appears by the record in said case and the docket of the entitled court.

{ Seal United States Circuit Court, District of Washington, Northern Division. }

JAMES C. DRAKE,
U. S. Marshal,
By H. A. BIGELOW, *Deputy.*

Dated Seattle, Wash., June 6th, 1893.

38 [Endorsed:] In the circuit court of the United States for the district of Washington, northern division. Frank Hanford, complainant, appellant, *vs.* Griffith Davies *et al.*, defendants, respondents. Citation. Filed June 6, 1893, in the U. S. circuit court. A. Reeves Ayres, clerk, by R. M. Hopkins, deputy. James B. Howe, solicitor for appellant, 52 Haller block, Seattle, Wash.

[Endorsed:] No. 89. In the United States circuit court for the district of Washington. Frank Hanford, appellant, *vs.* Griffith Davies *et al.*, appellees. Transcript.

Endorsed on cover: Case No. 15,372. Washington C. C. U. S. Term No., 260. Frank Hanford, appellant, *vs.* Griffith Davies and Isabella Davies, his wife, *et al.* Filed August 10, 1893.

FILED.
MAR 9 1896
JAMES H. McKENNEY,

IN THE

UNITED STATES

SUPREME COURT

HOLDING AT

WASHINGTON, D. C.

FRANK HANFORD, *Plaintiff,*

vs.

GRIFFITH DAVIES AND ISABELLA DAVIES, HIS WIFE, THOMAS W. PROSCH, VIRGINIA PROSCH, HIS WIFE, JOHN DOE AND MARY DOE, HIS WIFE, AND RICHARD ROE AND SUSAN ROE, HIS WIFE, THE TRUE NAMES OF THE LAST FOUR UNKNOWN, *Defendants.*

No. 260

Appeal from the United States Circuit Court, State of Washington, Northern Division.

MOTION TO DISMISS APPEAL

BRIEF ON BEHALF OF DEFENDANTS.

JAMES HAMILTON LEWIS,
Solicitor for Defendants.

J. A. STRATTON,
L. C. GILMAN, *Of Council.*

NEWMAN & MOULTON, PRINTERS, SEATTLE

IN THE

UNITED STATES

SUPREME COURT

HOLDING AT

WASHINGTON, D. C.

FRANK HANFORD, *Plaintiff*,

vs.

GRIFFITH DAVIES AND ISABELLA DAVIES, HIS WIFE, THOMAS W. PROSCH, VIRGINIA PROSCH, HIS WIFE, JOHN DOE AND MARY DOE, HIS WIFE, AND RICHARD ROE AND SUSAN ROE, HIS WIFE, THE TRUE NAMES OF THE LAST FOUR UNKNOWN,
Defendants.

No. .....

Appeal from the United States Circuit Court, State of Washington, Northern Division.

MOTION TO DISMISS APPEAL

BRIEF ON BEHALF OF DEFENDANTS.

To the Honorable Supreme Court of the United States:

Come now the defendants and respondents, and move the Court to dismiss this appeal and affirm the judgment for the reason that the Court is *without jurisdiction on appeal.*

(a) For that no certificate as required by law has been made by the presiding judge.

(b) For that no certificate *within term time* or within any proper limit of time, has ever been made by any judge who heard the cause.

And in support of the motion we respectfully urge:

POINT I.

The record shows that the judgment which is complained of was rendered, signed and certified upon *September 3, 1892,* in open court at Seattle, Washington, the demurrer being sustained on June 7th, 1892.

See record of transcript, page 13.

That the *certificate* upon appeal was made, *signed* and given upon the *3rd* day of June, *1893*, *one year* after the decision, *nine months* after judgment was rendered.

See transcript of record, page 13.

or exactly SIX MONTHS AFTER THE EXPIRATION AND CLOSE OF THE TERM, the term beginning June 7th, 1892, the first Tuesday, and ending September 7th, the second Tuesday, 1892.

See Acts of Congress, 26 Statutes at Large, page 45, section 6.

The Act of Congress creating the United States District Court, exercising Circuit Court powers, passed April 5th, 1890, prescribes the terms of the court, and specifically prescribes the terms at Seattle to begin on the first Tuesday of December and the first Tuesday of June each year.

See Sec. 6, Act of 1890, 26 Statutes at Large, page 45.

Saying:

"Sec. 6.—That the terms of the District Court for the District of the State of Washington shall be held at the City of Seattle on the first Tuesday of December and June of each year. * * * *."

And a preceding section relating to Circuit Courts, saying:

"Sec. 2.—That the Circuit Court of the United States in and for the State of Washington shall be held at the times and places as provided by law for the holding of the United States District Court in and for the said district. * * * *"

Thus it is apparent that the June term of the Circuit Court for the year 1892, beginning as it did, on June 7th, the first Tuesday, *it expired by limitation*, saying nothing of *sine die* adjournment, *on the first Monday of the month of December*, 1892, preceding the first Tuesday of said month in said 1892.

So the action of the Judge in making the alleged certificate was not only not until the expiration of the June, 1892, term, but after the expiration of the September term, 1892, and up to the beginning of the June term, 1893, TWO TERMS INTERVENING. This is fatal to jurisdiction, for that:

The certificate on appeals upon jurisdictional questions is the "bill of exceptions" in such case.

In general writs of error the exceptions are specially claimed and certified to by the judge. This becomes the bill of exceptions certified, the certificate giving to it its validity. Here, the certificate of the judge is the certifying of the only exception.

In the first instance the certificate of the judge is but certifying the bill of exceptions. In the latter the bill of exceptions is in the certificate of the judge.

Under section 5 of the act creating the Circuit Court of Appeals (1891) the question of jurisdiction alone shall be certified for decision.

Certainly it is clear that *no bill of exceptions* could be allowed after the expiration and close of the term, and after the intervening of a second term and at the beginning of a third term subsequent to that in which the decision complained of was rendered.

This is ruled in too frequent instances to be now questionable. In

Michigan Insurance Co. vs. Eldred, 143 *U. S.*, 298.

Say the Court by Mr. Justice Gray:

"After the term has expired without the Court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this Court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at end."

Considered in—

United States vs. Bratling, 20 *How.*, 252.
Muller vs. Ehlers, 91 *U. S.*, 249.
Hunnicut vs. Peyton, 102 *U. S.*, 333.
Davis vs. Patrick, 122 *U. S.*, 138.
Chateauguay Co., Petitioner, 128 *U. S.*, 544.
Jones vs. Grover Co., 131 *U. S.*, 150.
Heckman vs. Fort Scott, 141 *U. S.*, 419.

It will be noted that the case at bar presents that not only was the certificate not given until after the expiration of *two* terms, but after the *appeal of the whole case* had been *made* and *allowed*, and the cause was in the United States Supreme Court.

Appeal petitioned for June 23rd, 1893.
Appeal *allowed* June *2nd*, 1893.
Certificate *signed* and *allowed* June 3rd, 1893.
This was clearly *coram non judice.*

Michigan Insurance Co. vs. Eldred, supra.

See further—

Geaspell vs. N. P. R. R. Co., 144 *U. S.*, 211.
Hume vs. Bowie, 148 *U. S.*, 245.
Morse vs. Anderson, 150 *U. S.*, 158, *reaffirming.*
Michigan Insurance Co. vs. Eldred, supra.

POINT II.

THAT THIS CERTIFCATE CANNOT BE SO GRANTED OUT OF AND AFTER THE TERM IN WHICH JUDGMENT HAS BEEN RENDERED, HAS BEEN EXPRESSLY RULED.

In—

Colvin vs. Jacksonville, 158 *U. S.*, 457.

say the Court through the Chief Justice, the case arising precisely as the one at bar, the proceedings being identical:

"We are of the opinion that where the jurisdiction of the court below is in issue and the case is certified to us for decision, the certificate *must be granted during the term* at which the judgment or decree is entered, by analogy to the statutory provision on that subject which obtained in relation to certificates of division of opinion, * * and in view of the general inability of the court to deal with matters of this sort after the expiration of the term."

And later, when the question is before the Court and an attempt is made to consider such subsequent certificate as an order *nunc pro tunc*, that same court has to say:

> *The Bayonne*, 16 *Supreme Court Reporter, p.* 185.

"In Colvin vs. Jacksonville, 158 U. S., 456, it was decided that such certificate must be granted during the term at which the judgment or decree is entered.

The District Court of the United States for the Southern District of New York has monthly terms. (Revised Statutes, § 572.) The decree was here entered December 21, and the appeal allowed December 31, 1892. On the 17th of the following January, during a new term of the court the assignment of errors was directed to be filed *nunc pro tunc* as of December 31, 1892. If that assignment, continued the court, "could be treated as a certificate it came too late, and as there is nothing in the record prior to the expiration of the December term to indicate any attempt or intention to file a certificate during that term, and there was no omission to enter anything which had actually been done at that term, the cause did not come within the rule which permits an amendment to the record *nunc pro tunc*. * * * The certificate of November 8th, 1895, which gives a statement of the case and certifies certain specific questions of jurisdiction was also wholly unavailing at that date." * * * Concluding the Court says: "The conclusion is that this appeal must be dismissed for want of jurisdiction because of lack of the proper certificate, a defect which cannot now be supplied."

These cases must settle this point in favor of the motion on this second ground urged here as the first.

POINT III.

We further urge that the alleged certificate is not proper in form or in statement, does not comply with the act or its intention in this respect, to-wit:

It is evident that the act contemplated that the precise "question" upon which it is determined that jurisdiction does not exist be certified in order that the same "question" may be passed upon and set at rest by the highest tribunal, that the other questions of the rights involved may when determined be no longer embarrassed by that phase.

Certainly the precise "question" decided by the lower court is not certified when only the conclusion resulting from the decision of the question is alone certified.

Now "jurisdiction" in the Federal Court is limited, and within its limits has four special phases, neither necessarily connected with the other; often wholly foreign, to-wit:

(a) Diverse citizenship.
(b) Amount in controversy.
(c) Federal question as to subject matter.
(d) Claim under the Constitution.

Now the *certificate* should show what a bill of exceptions should: The ruling specially set up with so much of the surrounding situation as to properly limit the inquiry, and no conclusion from a decision would suffice; i. e., a general exception as follows, to-wit:

The court erred in excluding the testimony of John Doe, and holding the same incompetent. "In-

competent'' has many phases. It would have to be shown wherein it was incompetent; what facts made it ''competent.'' So ''no jurisdiction'' means only the general conclusion—not what ''question'' was decided.

That it was the object of the Act to have the appellate court decide the precise ''question'' decided by the lower court is apparent.

Now did the court decide that there was no diversity of citizenship? This can be held from the complaint's admission. Or that the amount of value did not exceed ''two thousand dollars?'' This, too, can be concluded. Or, that there was no Federal question, or that no right was claimed or privilege demanded under the Constitution or laws of the United States.

Upon either ''question'' the conclusion can be ''no jurisdiction.''

It may be the lower court held there no diversity of citizenship, and this concluded the jurisdiction. This court may hold that the complaint states ''no Federal question.'' Or the lower court may have held there was no Federal question, or that the value does not exceed two thousand dollars, and this court hold no jurisdiction because no diversity of citizenship. In either of these cases the appellate court is not deciding the ''question'' decided by the lower court, and the lower court has never yet certified the ''only'' question it decided. The case may in such event return and the lower court adhere to its first ruling of no jurisdiction, on a ''question of jurisdiction not presented to the Supreme Court nor decided, and which could not have been decided by the apellate court because unadvised by the very course Congress intended should advise the appellate court; i. e., the certificate of the ''question.''

That such seems to have been the meaning of the law concerning certificates upon division of opinion is borne out by a reference to the following cases where this court demanded the precise statement of the question, not its conclusion. See—

Insurance Co. vs. Wickham, 128 *U. S.*, 426.
Dublin Tp. vs. Milford, etc., 128 *U. S.*, 510.
U. S. vs. Hall, 131 *U. S.*, 50.
U. S. vs. Perin, 131 *U. S.*, 55.

The cases assert the doctrine that each "question had to be distinctly pointed out, and each question of law clearly stated, that it could be definitely answered without regard to other questions at issue;" not one of mixed law and fact, as one of *value* or *residence*. Therefore, no general exception or certificate necessarily involving several "questions," the decision of which may, either of them, be no jurisdiction as a conclusion.

Columbus Watch Co., vs. Robbins, 148 *U. S.*, 266.
Cincinnati Ham Pay. R. R. vs. McKeen, 149 *U. S.*, 259.

The construction contended for is recognized in *Maynard vs. Hecht*, 151 *U. S.*, 324.

The Court by the Chief Justice saying:

"The certificate must contain the *distinct point*, or *proposition* of *law*" * * and hence cannot be one only involving or implying a conclusion or judgment on the weight or effect of testimony or facts adduced.

It cannot answer to say in the record appears

the court's full decision, and to this can be looked to see the question argued or determined.

This would not be the *certificate*—not the *bill of exceptions.*

Suppose the Court wrote no opinion, as he was not bound to do, but merely concluded upon his own reasoning: "Demurrer sustained. Bill dismissed. Exception allowed."

What information of the "question" would the court get then?

Or suppose an opinion fully rendered yet neither published or contained in the transcript. In such case the certificate would be of no effect.

"The writ specifies no particular *ground* of error. * * * But in any view *the absence of the formal certificate cannot be helped out by resort to these papers.* THE INQUIRY IS NOT WHETHER WE CAN ASCERTAIN THE QUESTION SOUGHT TO BE PRESENTED, *but* whether we can exercise jurisdiction under the statute," etc. * * *

Maynard vs. Hecht, 151 *U. S.*, 324.

Here the court dismissed the case, as we think must be done in this case, for the grounds and reasons herein stated, and for which alone at this time we specially appear.

Respectfully urge,

JAMES HAMILTON LEWIS,
Solicitor for Defendants.

J. A. STRATTON,
L. C. GILMAN, *of Counsel.*

Office Supreme Court U. S.
FILED.
MAR 17 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 260.

FRANK HANFORD, APPELLANT,

vs.

GRIFFITH DAVIES AND ISABELLA DAVIES, HIS WIFE, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

BRIEF OF APPELLANT ON MOTION TO DISMISS APPEAL.

GEORGE DONWORTH AND
JAMES B. HOWE,
Counsel for Appellant.

(15,372)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 260.

FRANK HANFORD, APPELLANT,

vs.

GRIFFITH DAVIES AND ISABELLA DAVIES, HIS WIFE, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

BRIEF OF APPELLANT ON MOTION TO DISMISS APPEAL.

Appellees have moved to dismiss this appeal and to affirm the judgment appealed from, for the reason that this Court is without jurisdiction on appeal.

I.

So far as the motion to affirm is concerned, it is submitted that it must be denied because it is based on the ground that this Court "is without jurisdiction on appeal."

II.

The motion to dismiss is based upon two grounds, namely:

"*a.* For that no certificate as required by law, has been made by the presiding judge.

"*b.* For that no certificate within term time or within any proper limit of time, has ever been made by any judge who heard the cause."

If the case was one requiring a certificate of the jurisdictional question, it might be conceded that the appeal should

be dismissed under the authority of Colvin vs. Jacksonville, 158 U. S. 457, and The Bayonne, 16 Supreme Court rep. 158.

The appeal in this case, however, was taken under that subdivision of Section 5 of the Act of March 3rd, 1891, 26 Statutes at Large, pp. 826-828, which provides for an appeal from the Circuit Court to this Court:

"In any case that involves the construction or application of the Constitution of the United States."

The bill of appellant was demurred to by appellees upon two grounds:

1st. That the bill contained no equity. 2d. That the Circuit Court had no jurisdiction of the suit.—Folio 15. The demurrer was sustained.—Folio 22. Appellant elected to stand upon his complaint, declined to plead further, and thereupon the final decree was entered, dismissing the bill, with costs.—Folio 23. An appeal from said decree to this Court was prayed for, and was allowed without restriction or qualification.—Folio 26. A certificate of the jurisdictional question was, as a matter of precaution, attempted to be preserved so that in addition to the constitutional questions involved, the question of jurisdiction might be considered, the appeal having been taken prior to the publication of the decisions of this Court upon appeals, under the Act of March 3rd, 1891.

The certificate was ineffectual, under the decisions above cited, for the reason that it was obtained after the expiration of the term at which the decree was rendered.

A certificate is, however, entirely unnecessary, because the case is one involving the construction and application of the Constitution of the United States, and this Court has jurisdiction of the whole case and of all questions in it, including the question of jurisdiction.

In Chappell vs. United States, 16 Supreme Court Reporter, pp. 397-400, this Court said:

"Here certainly is no such clear, full and separate statement of a definite question of jurisdiction as will supply the want of a formal certificate under the first clause of the statute. But, no question of jurisdiction having been separately certified or specified and the writ of error having been allowed without restriction or qualification, this Court, under the other clause of the statute above mentioned, has appellate jurisdic-

tion of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions whether of jurisdiction or of merits.—Nishimura Ekiu vs. U. S., 142 U. S. 651; Horner vs. U. S., 143 U. S. 570, 577; U. S. vs. Jahn, 155 U. S. 109, 112, 113."

The bill in the case at bar invoked the jurisdiction of the Circuit Court solely upon the ground that the suit was one arising under the Constitution of the United States.

A.

The first provision of the Constitution on which appellant relies is Article I, Section 10, which prohibits a state from passing a law impairing the obligation of contracts.

The bill sets forth the title of appellant to the land in dispute.—Folio 1.

The value of the property.—Folio 2.

The contract entered into between the Territory of Washington and Thaddeus Hanford, appellant's grantor.—Folios 2-3.

The purchase of the land by appellant on the faith of that contract, on September 17th, 1885, for value and in good faith. —Folio 3.

The possession of appellant.—Folio 4.

The action of the Territory impairing the obligation of this contract.—Folios 4–7.

The first question arising under this proposition is whether Section 10, Article 1, is a prohibition upon the territories as well as upon the states. If there was no legislation on the part of Congress extending the Constitution over the territories, the question whether the territories were included within the prohibition might be answered in the negative.

Hepburn vs. Elzey, 2 Cranch, 445.

Congress, however, has enacted legislation which makes it clear that the prohibition placed upon the states of the Union is also placed upon the territories of the United States. The Revised Statutes of the United States, Section 1851, declares:

"The legislative power of every territory shall extend to all

rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Section 1891 declares that:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized, as elsewhere within the United States."

The foregoing sections extend to the inhabitants of the territories the protection of the Constitution of the United States as fully as the Constitution itself extended it to the people of the states. No other meaning can be given to Section 1891 than that the provisions of the Constitution, and the laws of the United States, which are not locally inapplicable to the territories, shall have the same force and effect in the territories as in the states; for as the territories organized and the territories to be thereafter organized include all the territories, the word "elsewhere" must refer to that part of the United States not within the territories, viz: the states. Is, then, the prohibition against the impairment of the obligation of a contract by a law of the state, a provision of the Constitution locally inapplicable to a territory? It is perfectly clear that as great a wrong is done when the obligation of a contract is impaired by a law passed by a territory, as when by a law of a state. Moreover, in the organic act of Oregon Territory, approved August 14, 1848, United States Statutes at Large, Volume 9, page 323, and which was continued in force in Washington Territory by Section 1952 of the Revised Statutes, it was enacted by Congress:

SECTION 14. "That the inhabitants of said territory shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the River Ohio, by the articles of compact contained in the ordinance for the government of said territory, on the thirteenth day of July, seventeen hundred and eighty seven, and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of said territory."

Article 2 of said ordinance declares:

"And in the just preservation of rights and property, it is understood and declared that no laws are ever to be made or have force in the said territory that shall in any manner

whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed."

It is evident, therefore, that Congress deemed it proper to restrain the territories of Oregon and Washington from passing a law impairing the obligation of a contract. It is plain that Congress deemed a restraint placed upon the states of the Union, a restraint proper to be placed upon the territories. The provision of the Constitution restraining a state from passing a law impairing the obligation of a contract is, therefore, not inapplicable to the territories.

Maynard vs. Hill, 125 U. S., 190.

It is, therefore, submitted that by Sections 1851 and 1891 of the Revised Statutes, Congress intended the word "State" in Section 10, Article 1, of the Constitution, to include in meaning the word "Territory."

De Geofroy vs. Riggs, 133 U. S., 258–268.
Talbott vs. Board of County Commissions, 139 U. S., 438.

Assuming that the territories, equally with the states, are prohibited by the Constitution of the United States from passing a law impairing the obligation of contracts, the next question is whether the bill alleges facts showing that the Territory of Washington has passed a law impairing the obligation of the contract entered into between said territory and appellant's grantor. The bill alleges that appellant is the owner of the land described therein, that the land was conveyed by deed to appellant's immediate grantor on the 14th day of October, 1878, by the Territory of Washington, in pursuance of a sale of said land made by said territory, as the property of Lumley Franklin, for taxes levied thereon, and in which deed said territory, as party of the first part, contracted as follows:

"Now, therefore, the said party of the first part, by authority of the statute in such case made and provided, for the consideration of the sum of money above mentioned, paid to the county treasurer of said county, has granted, bargained, sold and conveyed and by these presents does grant, bargain, sell convey and confirm unto the said Thaddeus Hanford, his heirs and assigns, said described real estate, together with all and singular the tenements and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof, as well in law as in equity, and the right, title and in-

terest of the said Lumley Franklin and all owners known or unknown, of, in or to the above described premises."—Folio 1-2.

The statute law of Washington Territory in force at the date of the sale and at the date of the execution of said deed, contained the following provision which must be read into said deed as a part of the contract made by said Territory, viz:

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid, or the land redeemed, as provided by law, shall be commenced within three years from the time of recording the tax deed of sale and not thereafter, except by the purchaser at the tax sale."—Folio 3.

Laws of Washington, 1869, p. 176.

The foregoing section was taken from the statute of Wisconsin. The statue of Wisconsin was as follows:

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid or the land redeemed, as provided by law, shall be commenced within three years from the time of recording the tax deed of sale and not thereafter.

Revised Statutes of Wisconsin of 1849, Chap. 15, Sec. 123, p. 164.

The adoption of said statute by Washington Territory did not, however, take place until after the statute had been construed by the Supreme Court of Wisconsin and by this Court.

Leffingwell vs. Warren, 2 Black, U. S.. 599.
Coulter vs. Stafford, 48 Fed. Rep., 266. Overruled in 56 Fed. Rep., 564.

The construction which had been placed upon the statute by this Court and the Supreme Court of Wisconsin should, upon an elementary principle, be deemed adopted as a part of the statute itself; but, in the case at bar, we are not compelled to resort to a presumption as to the intention of the Legislature. At the time this Court decided Leffingwell vs. Warren, *supra*, it was the court of last resort in cases arising in Washington Territory; and when Washington Territory adopted the above mentioned statute, it adopted it with the meaning given it by this Court, and that meaning became a part of the statute as fully as though, after its enactment, a case from

Washington Territory had come to this Court and the statute had by this Court been construed.

In Leffingwell vs. Warren, *supra*, this Court, after reciting the Wisconsin statute, and the cases excepted from its provissions, said:

"This case does not fall within either of these exceptions. We have no power to add to them. To do so would be to usurp the function of another and distinct governmental department. It would be legislation and not adjudication. * * * The lapse of time limited by such statutes not only bars the remedy but it extinguishes the right and vests a perfect title in the adverse holder."

In the case at bar, the bill alleges that the deed to appellant's grantor was recorded in the office of the Auditor of King County, Washington Territory, on November 25, 1878, and that the grantee named in said deed immediately entered into possession of said premises, improved the same, paid taxes thereon and remained in possession until appellant purchased said premises.—Folio 3.

The bill further alleges that in September, 1885, more than three years after recording the tax deed, appellant in good faith, for valuable consideration, relying upon the contract entered into between the territory and his grantor and the laws of said territory then existing confirming the title of his grantor, purchased said property from the grantee of the territory, received a deed therefor and entered into possession of said land. The bill also further alleges that in July, 1887, the Territory of Washington, by its agent, one W. Finley Hall, applied to the Probate Court of King County for letters of administration upon the estate of Franklin, alleging the death of Franklin out of the Territory of Washington, that he was a resident of British Columbia, that he left no property in Washington Territory except real estate—the land in question; that said application was not made in behalf of any creditor of Franklin or any relative of Franklin, but was made by said Hall as the agent of Washington Territory. The Court granted the letters of administration. In March, 1888, said Court as the agent of the territory and without any jurisdiction, ordered and caused to be sold the land in question, as the land of Lumley Franklin, to satisfy a tax claimed by said territory from the said Franklin, and in pursuance of said

sale, caused to be executed to appellee, Griffith Davies, the deed under which appellees claim title and which appellant claims is a cloud upon his title.—Folios 4, 5 and 6.

It is perfectly plain that had the Legislature of the Territory of Washington enacted a law by which the property, sold by the territory to appellant's grantor as the property of Franklin, was restored to Franklin, such statute would be within the constitutional prohibition.

"A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to re-assert that right. A party is therefore always estopped by his own grant. * * * A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property, from the obligation of conveying the property by conveyances."

Fletcher vs. Peck, 6 Cranch, 87-137.
Wright vs. Nagle, 101 U. S., 791.

In the case at bar, the Territory, by reason of the law, contracted with appellant's grantor that, upon the expiration of three years from the recording of the tax deed, no action should be maintained for the recovery of the land. The three years expired. Appellant purchased the land on the faith of the Territory's contract. The statute had been construed by this Court prior to appellant's purchase, and that construction was that the statute vested in appellant's grantor absolute title to the land.

The Probate Court, as the agent of the Territory, in a proceeding to which appellant was not a party, sold the land as though title was still in Franklin. The action of the Probate Court, if given effect, takes the property of Hanford and re-vests it in Franklin. Appellant having purchased the property, after the expiration of three years from the date of recording the tax deed and after the statute of limitations of the Territory of Washington had been interpreted by this Court to vest absolute title in the grantee of the Territory upon the expiration of such period, the decision of the Probate Court ordering the property to be sold as the property of Franklin, was a law

of the Territory impairing the obligation of the contract entered into between the Territory and appellant's grantor.

Olcott vs. Supervisors of Fond du Lac County, 16 Wall., 678.
Havermeyer vs. Iowa City, 3 Wall., 294.
Gelpcke vs. Dubuque, 1 Wall., 175.
Ohio Life Ins. & Trust Co. vs. Debolt, 16 How., 416.
Butz vs. Muscatine, 8 Wall., 575.
Douglas vs. County of Pike, 101 U. S., 677-687.
Louisiana vs. Pillsbury, 105 U. S., 278.

The section of the act of 1869, quoted above, was re-enacted in the Code of Washington Territory and became Section 2939 of the Code of 1881. It was not until March 26th, 1888, that the Probate Court ordered the land in question to be sold. If the Probate Court held that that section, as re-enacted, did not vest title absolutely in appellant's grantor, upon the expiration of three years from the recording of the tax deed, and it must have so held in order to render the judgment which it did render, its decision was in effect to construe the re-enactment as a repeal of the original section, and was consequently, a law impairing the obligation of the contract.

B.

The second provision of the Constitution of the United States, which appellant claims the protection of, is that clause of Section 1 of the 14th Amendment to the Constitution of the United States, which prohibits a state from depriving any person of property without due process of law.

It is respectfully submitted that the bill clearly shows that appellant has been deprived of his property without due process of law, if the order of the Probate Court and the sale thereunder be sustained.

As stated in the argument upon the preceding proposition, upon the expiration of three years from the date of the recording of the tax deed from the territory to appellant's grantor, the title became absolute in such grantor, except upon certain contingencies not involved in the case at bar. Appellant's grantor recorded his deed and maintained possession of the land thereafter, for nearly seven years, when he sold the land to appellant, who entered into possession of the same. Appellant, therefore, had a vested title in the land.

"When the period prescribed by the statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entited to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference as it would have been had it been perfected in the owner by grant, or by any species of assurance."

Cooley on Constitutional Limitations, 5th Edition, top page 449.
Holden vs. James, 11 Mass., 396.
Wright vs. Oakley, 5 Met., 400.
Lewis vs. Webb, 3 Me., 326.
Atkinson vs. Dunlap, 50 Me., 111.
Davis vs. Minor, 2 Miss., 183.
Hicks vs. Steigleman, 49 Miss., 377.
Knox vs. Cleveland, 13 Wis., 245.
Sprecker vs. Wakeley, 11 Wis., 432.
Pleasants vs. Rohrer, 17 Wis., 577.
Moor vs. Luce, 29 Penn. St., 260.
Morton vs. Sharkey, McCahon, 113.
McKinney vs. Springer, 8 Blackf., 506.
Bradford vs. Brooks, 2 Aik., 284.
Stipp vs. Brown, 2 Ind., 647.
Briggs vs. Hubbard, 19 Vt., 86.
Wires vs. Farr, 25 Vt., 41.
Woart vs. Winnick, 3 N. H., 473.
Rockport vs. Walden, 54 N. H., 167.

"The English and American statutes of limitation have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title — a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this Court. Leffingwell vs. Warren, 2 Black, 599; Croxall vs. Shererd, 5 Wall., 289; Dickerson vs. Colgrove, 100 U. S., 583; Bicknell vs. Comstock, 113 U. S., 152. It is the doctrine

of the English courts and has been often asserted in the highest courts of the States of the Union."

Campbell vs. Holt, 115 U. S., 620.

The bill alleges that appellees claim title to the land in question under a deed executed in pursuance of a sale of the land ordered by the Probate Court to be made as the land of Lumley Franklin. The bill further alleges that the Probate Court acted entirely without jurisdiction in all of its proceedings and with knowledge of its want of jurisdiction. The substance of the allegations is as follows:

That in July, 1887, many years after the land had been sold to appellant's grantor and nearly nine years after the deed had been recorded, the Territory of Washington, by its agent, one W. Finley Hall, presented a petition to the Probate Court of King County, alleging the death of said Franklin out of the territory; that Franklin was a resident of British Columbia; that there were no general creditors and that Franklin left no property in the Territory of Washington, except real estate; that said Hall was not a creditor of Franklin, nor was he of kin to Franklin, nor did he act in behalf of any creditor or kin of Franklin. That on the 8th day of August, 1887, said Court assumed to appoint Hall administrator of said estate. On the 20th of August, 1887, Hall filed his inventory showing that there were no debts against said estate, no personal assets and that the land in controversy constituted the sole assets of said estate. That thereafter, the Probate Court ordered the land to be sold as the property of Franklin to pay a tax claimed by the territory from Franklin, and thereafter, caused such sale to be made and the deed executed to the appellee, Griffith Davies. That said Hall and the Probate Court, in all of said proceedings, acted as agent of the territory for the purpose of collecting said tax. That said Hall and said Court, at the time of said proceedings, were fully aware that said land had been sold to appellant's grantor as the property of Franklin for non-payment of taxes and that appellant had in good faith, for valuable consideration, and without notice of any claim on the part of any person claiming adversely, purchased said land. That appellees had actual notice of appellant's title, but with intent to create a cloud upon appellant's title, purchased at the probate sale. Folios 4, 5, 6.

If the facts alleged in the bill to show a want of jurisdiction in the Probate Court, do show a want of jurisdiction in that Court, its proceedings were void, and to uphold them would result in the territory having deprived appellant of his property without due process of law.

In Scott vs. McNeal, 154 U. S., 34, this Court said:

"The Fourteenth Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains: 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislature, its executive, or its judicial authorities. Virginia vs. Rives, 100 U. S., 313, 318, 319; *Ex parte* Virginia *Id.*, 339, 346; Neal vs. Delaware, 103 U. S., 370, 397."

In Scott vs. McNeal, *supra*, this Court, in reversing the judgment of the Supreme Court of the State of Washington, which sustained a sale ordered by the Probate Court of Thurston County, in the Territory of Washington, of the real estate of a living man, upon whose estate letters of administration had been granted, said:

"No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

This Court held that the judgment of the Probate Court was void, because it was not due process of law, and that the sale made thereunder conveyed no title. The question then, in the case at bar, is, had the Probate Court of King County, in the Territory of Washington, jurisdiction to grant letters of administration upon the estate of Franklin, and if so, had it jurisdiction to order a sale of the land of appellant to satisfy a claim of the Territory against Franklin?

A probate court is a court of special and limited jurisdiction, deriving all of its authority from statute.

Hershberger vs. Blewett, 55 Fed. Rep., 170.
Hendricks vs. Cleaveland, 2 Vt., 330.
Smith vs. Rice, 11 Mass., 507.
Sumner vs. Parker, 7 Mass., 79.
Woodward vs. Lincoln, 91 Mass., 239.
Hanscom vs. Marston, 19 Atl. Rep., 460 (Me.).

Davis vs. Davis, 11 Ohio St., 386.
Saylor vs. Simpson, 12 N. E. Rep., 181 (Ohio).
In re Marston, 8 Atl. Rep., 87 (Me.).
Overseers vs. Gullifer, 49 Me., 360.
Towle vs. Coe, 63 Me., 248.
Levering vs. Levering, 2 Atl. Rep., 3 (Md.).
Brodess vs. Thompson, 2 Har. & G., 120 (Md.).
State vs. Warren, 28 Md., 338.
Townsend vs. Brooke, 9 Gill, 90 (Md.).
Wood vs. Stone, 39 N. H., 573.
Dakin vs. Hudson, 6 Cowen (N.Y.), 221.
Francis vs. Northcote, 6 Texas, 186.
Henry vs. Keays, 12 La., 214.
Erwin vs. Lowry, 1 La. An., 276.
Bevan vs. Cooper, 72 N.Y., 327.
Hanner vs. Silver, 2 Oregon, 337.
Coil vs. Putnam, 46 Mo., 51.
Chadwick vs. Chadwick, 13 Pac. Rep., 385 (Mont.).
Moore vs. Koubly, 1 Idaho, 55.
Carr vs. Catlin, 13 Kansas, 404.

In Scott vs. McNeal, *supra*, this Court said, speaking of probate courts:

"All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect, being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons, of full age and sound mind, or to determine that a living man is dead and thereupon undertake to dispose of his estate. A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the Court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in any wise bind or estop him, or deprive him while alive, of the title or control of his property."

The determination by a probate court that the person whose estate is sought to be administered is dead, when such person is, in fact, alive, does not give the court jurisdiction if such fact does not exist.

We submit that it is equally essential to the jurisdiction of

a probate court that there should exist, as a fact, an estate of a deceased person within the limits of the jurisdiction of the Court. It is the existence of the fact of such an estate, and not the determination by the Court of its existence, which gives the Court jurisdiction. There must not only be in fact a decedent, but there must be an estate of such decedent within the jurisdiction of the Court, or there is nothing upon which letters can issue. The statute of the Territory of Washington, at the time the proceedings in the Probate Court set forth in the bill were had, was as follows:

Code of 1881, Section 1340:

"Wills shall be proved and letters testamentary or of administration shall be granted:

1. In the county of which deceased was a resident or had his place of abode at the time of his death.

2. In the county in which he may have died, leaving estate therein, and not being a resident of the territory.

3. In the county in which any part of his estate may be, he having died out of the territory and not having been a resident thereof at the time of his death."

Section 1341:

"When the estate of the deceased is in more than one county, he having died out of the territory, and not having been a resident thereof at the time of his death, the probate court of that county in which applicatoin is first made for letters testamentary or of administration, shall have exclusive jurisdiction of the settlement of the estate."

The bill shows that Franklin died out of the territory and was not a resident thereof, but was a resident of British Columbia. The Probate Court of King County then had jurisdiction to grant letters of administration upon his estate only in the event that a part of his estate was situate in said King County.

In American Law of Administration, Woener, Section 205, the law is stated as follows:

"No administration can be granted in the case of a deceased non-resident, unless he left property within the jurisdiction of the court making the appointment."

Christie vs. Vest, 36 Iowa, 285.
Jeffersonville Railroad Co. vs. Swayne, 26 Ind., 477.

A court of probate must indeed inquire into and be satisfied of the fact that the deceased left property within the jurisdic-

tion of the court to which application is made for the grant of letters, in the same manner that it must inquire into and be satisfied of the fact of the death of such person, because without that fact, the court has no jurisdiction, but its determination that such fact exists when it does not exist does not give it jurisdiction.

The decision in Perry vs. St. Joseph & W. R. Co., 29 Kan., 299, fully sustains this proposition.

The statute of Kansas, Sec. 1, Chap. 37 Compiled Laws 1879, reads as follows:

"That upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death, and when any person shall die intestate in any other state or country, leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered: and the administration which shall be first lawfully granted in the last mentioned case, shall extend to all the estate of the deceased within the state and shall exclude the jurisdiction of the probate court in every other county."

In construing the statute, the Supreme Court of Kansas used the following language:

"If the deceased was not an inhabitant or resident of this state at the time of her death, and if she left no estate to be administered within this state, and none came into it afterwards, then the probate court of Doniphan county had no jurisdiction to issue letters of administration on the estate of the deceased, or to appoint the plaintiff her administrator, and all its acts in doing so are void *in toto*. It has been decided in many cases that administration granted on the estate of a person not really dead is totally void. Stephenson vs. Superior Court, 15 Reporter, 140; Griffith vs. Frazier, 8 Cranch, 23; Williams, Exr's (Amer. Notes, Perkins), 632, and notes to page 631. The jurisdiction of the probate court of Doniphan county to issue letters of administration is derived from the provisions of the statute, and can be only exercised under the circumstances and in the cases provided for thereby. Therefore, if the deceased, not being an inhabitant or resident of this state at the time of her death, left no estate to be administered within this state, and none comes into it afterwards, that court, under the statute, has no jurisdiction to grant administration. But it is said that the probate court had jurisdiction to ascertain whether as a fact the deceased left any estate in Kansas, and its judgment granting letters of administration is conclu-

sive until revoked or reversed. Where the jurisdiction of a court is conceded, as a rule its judgment is conclusive of all matters involved; but if the jurisdiction be disproved, then the judgment is void for all purposes. Mastin vs Gray, 19 Kan., 458, and the cases there cited; Melia vs. Simmons, 45 Wis., 334; Moore vs. Smith, 11 Rich. Law, 569.

"Now, the Probate Court of Doniphan County had no authority to grant letters of administration unless the deceased left an estate in that county; and it will not do to say that the finding of that fact by the Court is conclusive of its own jurisdiction, for this would be, to use a common expression, 'reasoning within a circle.' The probate court of that county, we suppose, assumed that the deceased had left an estate to be administered, and thereupon appointed the plaintiff administrator. But the letters in this case are no more valid, and the appointment of an administrator no more effective, than if the Probate Court of Doniphan County had granted letters of administration upon her estate when in fact she was not dead. In either case, the appointment of an administrator would be void for all purposes; and as in this case the jurisdiction of the Probate Court rests upon the fact of an estate belonging to the deceased in Kansas, if the defendant can clearly show that the deceased died without leaving any estate of any kind, it must result that the entire proceedings before the Probate Court were without jurisdiction, and void. D'Arusmart vs. Jones, 11 Cent. Law J., 253; Thompson vs. Whitman, 18 Wall., 457; Jochumsen vs. Bank, 3 Allen, 87."

Inasmuch as the bill alleges, that at the time the probate proceedings were had, in pursuance of which the land was sold as the property of Franklin, the title to the property was in appellant, and as the bill shows that the probate proceedings disclose the fact that there was no estate of Franklin within King County or within the State of Washington, the Probate Court of King County had no jurisdiction to grant letters of administration. As the Probate Court had no jurisdiction to grant letters of administration, all subsequent proceedings were void.

To uphold the proceedings of the Probate Court would be to determine that the title of appellant to the property was divested by the sale made in pursuance of the order of the Probate Court. To so hold would be to deprive appellant of his property without due process of law.

Scott vs. McNeal, supra.

If it should be conceded for the sake of argument, that the Probate Court had jurisdiction to grant letters of administration, the conclusion cannot be escaped that it had no jurisdiction to order a sale of the property in question.

The grant of jurisdiction to the probate courts of the Territory of Washington was contained in Section 1907 of the Revised Statutes of the United States, and the power therein granted is probate jurisdiction.

All chancery and common law jurisdiction was vested in the Supreme Court and in the district courts of the territory.

R. S. U. S., Sections 1866–1868.
Ferris vs. Higley, 20 Wall., 375.
Locknane vs. Martin, 1 Kan., 495.
Dewer vs. Dyer, 1 Kan., 507.
Moore vs. Koubly, 1st Idaho, 55.
Chadwick vs. Chadwick, 13 Pac. Rep., 385.

"Jurisdiction of all probate and testamentary matters may be completely exercised without possessing the power to order the sale of lands of an intestate. Such jurisdiction does not appear to us to be identical with that power or to comprehend it."

Bank of Hamilton vs. Lessee of Dudley, 2 Peters, 492.

"The power to order the sale of real estate to enforce the payment of a decedent's debts, if the personal estate is insufficient, is ascribed to chancery courts and is generally exercised by them upon the application of creditors in those states in which such jurisdiction is not vested exclusively in the probate courts."

Am. Law of Adm. Woerner, p. 1022, Secs. 463–464, and cases cited in note 1.

Of course, where the Legislature has power to create a probate court and to define its jurisdiction, it can invest a probate court with chancery powers, but where a probate court is created by act of Congress, an act of the Legislature of the territory could not invest it with chancery jurisdiction because Congress has limited its jurisdiction to mat'ers of probate, and matters of probate do not include the exercise of chancery jurisdiction.

In no event, however, had the probate court jurisdiction to

sell land which was not a part of the estate of the decedent. The land in question was appellant's. It was not an asset in the hands of the administrator.

Withers vs. Patterson, 27 Texas, 491.
Heath vs. Wells, 5 Pick., 139.

If the proceeding in the probate court should be regarded as one *in rem*, it would be of no binding force against appellant.

The Mary, 9 Cranch, 126.
Hollingsworth vs. Barbour, 4 Peters, 466–475.
Pennoyer vs. Neff, 95 U. S., 714–727.
Rose vs. Himely, 4 Cranch, 241–269.
Thompson vs. Whitman, 18 Wall., 457.
Scott vs. McNeal, supra.
Windsor vs. McVeigh, 93 U. S., 274.

The statute of the Territory of Washington providing for the sale of a decedent's real estate for the payment of his debts, provided as follows (Code of 1881):

"Section 1493. When the personal estate in the hands of the executor or administrator shall be insufficient to pay the allowance to the family, and all the debts and charges of the administration, the executor or administrator may sell the real estate for that purpose upon the order of the probate court. To obtain such order he shall present a petition to the court setting forth the amount of the personal estate that has come to his hand, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of the party presenting the same.

Section 1494. If it shall appear by such petition that there is not sufficient personal estate in the hands of the executor or administrator to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate for the payment of such debts, the probate court shall thereupon make an order directing all persons interested to appear at a time and place specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order shall not be granted to the executor or administrator to sell the real estate of the

deceased, or so much thereof as shall be necessary to pay such allowances, charges and debts."

It is clear that those sections provided for a sale of the real estate only in the event of the personal property being insufficient to pay the debts, the family allowance and the costs of administration.

In the case at bar the probate proceedings showed, as appears by the bill, that there were no debts. The proceedings further showed that the sale was made solely for the purpose of enabling the territory to collect a tax which it claimed from Franklin, but the proceedings also show that Franklin was a non-resident. The tax claimed by the territory was, there-therefore, not a debt of Franklin's.

"Where a non-resident is the owner of tangible property within the state and the state imposes taxes upon it, the tax is not a charge against the owner personally, but must be enforced against the property itself. The state has no jurisdiction to assess a tax as a personal charge against non-residents."

Cooley on Taxation, 2d Ed., 21.

If the land sold to pay the tax was the property of appellant, and the demurrer admits it to have been, of course all the probate proceedings were void; but even had the property been the property of Franklin, there was no jurisdiction given to the Probate Court to entertain proceedings for the collection of a tax, especially in view of the tax not being a debt. If the tax was not a debt of Franklin's, no sale could be made by the Probate Court in order to pay it.

"Proceedings to sell real estate for the payment of the debts of a deceased cannot be maintained where an action would not lie upon the original indebtedness."

Wendell on Disposition of Decedents' Estates, p. 24.

"Unless it appears from its (the petition's) averments that debts which the decedent had contracted during his lifetime are still unpaid, and that there are no personal assets sufficient to discharge them but real estate which is liable for their payment, the court will have no power to order or license such sale, and therefore, any order so made and any sale thereunder must be void."

Woerner on Adm., p. 1035.

"Where there are no debts due by a decedent, there can be no sale of lands of his estate to pay the expenses of an administration had thereon. * * * In every case, however, where an application is made to sell lands for the expense of administering the estate only, it must be made to appear that the expenses were incurred in the course of administering the estate to pay debts due personally by the decedent."

Mays vs. Rogers, 52 Arkansas, 320.

"No sale of real estate will be ordered to pay expenses of administration alone, if there are no debts of decedent."

Real Property Trials by Malone, 738.

"By statute, all the property of a decedent except such as is declared exempt, is charged with the payment of his debts and may be sold for the payment of the same. This charge the personal representative cannot defeat by a distribution of the lands among the heirs or devisees, before the debts are paid. The statute, however, has been construed as charging the lands with debts owing by the decedent at the time of his death, and it has been held that they cannot be sold to pay the cost and expense of administration when no debts of the decedent are shown, for the payment of which the lands are liable, under the statute."

Garrett vs. Garrett, 64 Ala., 263.

Sermon vs. Black, 79 Ala., 507.

Beadle vs. Steele, 86 Ala., 413.

"The debts so proved to exist must be such as were contracted by the deceased himself. No sale of real estate will be ordered to pay expenses of administration alone, or any debts incurred by the executor or administrator after the death of the deceased or intestate, except funeral expenses. It has been so held in Alabama, Illinois, Massachusetts, Mississippi, Missouri, New York and Pennsylvania. In Maine, the legality of a sale for the payment of expenses has been questioned, but there is no direct adjudication upon the point. No decision has come to the notice of the writer from any of the states, in which the sale of real estate for the payment of the expenses of administration alone, is held valid, except an intimation in a very briefly considered case in Indiana, a dictum in New Jersey and a case in California, in which the refusal to order the sale of real estate to pay the costs incurred in litigation concerning the will, was held error."

Woerner on Administration, p. 1039.

Whatever view might be taken of the jurisdiction of the Probate Court to sell the land if it had been a part of the estate of Franklin, the Probate Court was entirely without jurisdiction to determine the question of title as between the administrator of Franklin and this appellant. This appellant cannot be bound by any judgment which the Probate Court rendered in that proceeding, for had this appellant appeared in that proceeding, he could not have conferred jurisdiction upon the Probate Court by an express consent to its assumption of jurisdiction to determine the question of title between the administrator and this appellant.

In Stewart vs. Lohr, 1 Washington, 341, the Supreme Court of Washington said, speaking of the probate courts of the territory:

"That the probate court is without jurisdiction to try title to property as between representatives of an estate and strangers thereto, is too well established by the authorities to require argument.

"*See Schouler Exrs. and Admrs., Sec. 236.*
"*Lynch vs. Divan, Exr., 66 Wis., 490.*
"*Budd vs. Hyler, 27 N. J. Law, 43.*
"*Snodgrass vs. Andrews, 30 Miss., 472.*
"*Theller vs. Such, 57 Cal., 447.*"

The Probate Court was, therefore, in every view of the case, clearly without jurisdiction, and its judgment was void.

United States vs. Walker, 109 U. S., 258.

The judgment of the Probate Court was, therefore, a nullity, and its sale of appellant's property thereunder, if upheld, would deprive him of his property without due process of law, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States.

The questions involved in this suit are not the construction and application of Sections 1851 and 1891 of the Revised Statutes of the United States, or of any statute of the United States, but of the ~~other~~ provisions of the Constitution made applicable to the territories by those sections, and also the construction and application of Section 1 of the Fourteenth Amendment to the Constitution.

For the purpose of defeating this motion it is not necessary

to determine whether, upon the merits of the case, appellant is entitled to the relief sought, or not. It is only necessary to determine whether the case is one that involves the construction or application of the Constitution of the United States.

The test of the right of removal of a suit brought in a state court to the Circuit Court of the United States, on the ground that it is one arising under the Constitution of the United States, is the test to be applied in determining whether this suit is one which involves the construction or application of the Constitution of the United States.

In State vs. Coosaw Mining Company, 45 Fed. Rep., page 804, the court said (page 806):

"There can be no doubt that if the question whether the Act of 1890 impairs the obligation of a contract, can be made to appear on that part of this record which this Court is at liberty to examine, at this stage of the proceedings, the case is removable. It is a federal question arising under the Constitution of the United States."

In Southern Pacific Railroad Co. vs. California, 118 U. S., page 109, this Court said:

"The right of removal does not depend upon the validity of the claim set up under the Constitution (or laws). It is enough if the claim involves a real and substantial dispute or controversy in the suit."

In Cooke vs. Avery, 147 U. S., 375, this Court said:

"Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or laws of the United States or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States. Osborn vs. Bank, 9 Wheat., 738; Starin vs. City of New York, 115 U. S. 248."

Appellant, in his bill in the case at bar, alleges that the Probate Court acted entirely without jurisdiction in selling his property to appellees. The demurrer admits the truth of the the allegation.

This Court has said, speaking of a sale by a court of probate of the Territory of Washington:

"No judgment of a court is due process of law, if rendered without jurisdiction in the court or without notice to the party."

The demurrer concedes that appellant is the owner of the land in dispute, unless he has been divested of title thereto by a sale of the land made by the probate court.

Appellant claims that to give effect to the judgment of the probate court, that court being entirely without jurisdiction, would be to deprive him of his property without due process of law, in contravention of the prohibition of Section 1 of the 14th Amendment to the Constitution of the United States.

The argument advanced against the motion to dismiss is practically the same argument that will be advanced upon the hearing of the appeal upon the merits.

The case will be heard upon its merits within the next thirty days. As the question involved in the motion to dismiss is one of the jurisdiction of this Court and one which this Court would raise on its own motion, it would seem that it is one which might be considered at the time fixed for the hearing on the merits.

It is therefore urged, that for the reasons above stated, the motion should be denied.

Respectfully submitted.

GEORGE DONWORTH AND
JAMES B. HOWE,
Counsel for Appellant.

Office Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895

No. 260.

FRANK HANFORD, APPELLANT,

vs.

GRIFFITH DAVIES AND ISABELLA DAVIES, HIS WIFE, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

BRIEF OF APPELLANT

GEORGE DONWORTH AND JAMES B. HOWE,
Counsel for Appellant.

(15,372)

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STATEMENT OF CASE.

This is an appeal from the Circuit Court of the United States for the District of Washington. Appellant, in his bill, invokes the protection of that clause of Section 10, Article 1 , of the Constitution of the United States, which prohibits a State from passing a law impairing the obligation of contracts; and also that clause of Section 1, of the 14th Amendment to the Constitution of the United States, which prohibits a State from depriving any person of property without due process of law.

Appellant filed his bill in the Circuit Court of the United States for the District of Washington, wherein he prayed to have his title to twenty acres of land situate in the City of Seattle, and described in his bill, quieted against appellees' claim of title, and to have appellees' deed, covering said land, cancelled as a cloud upon appellant's title. The bill alleged that appellant and appellees were all citizens of the State of Washington, and the jurisdiction of the Circuit Court was in-

voked solely upon the ground that the suit was one arising under the Constitution and laws of the United States. The bill, omitting its introduction and prayer, is as follows:

And thereupon your orator complains and says—

I. That your orator at all the times herein mentioned had, now has, and for a long time prior hereto has had a valid subsisting interest in and a right to the possession as owner in fee of the following described land, situate in the City of Seattle, County of King, and now State of Washington, to-wit:

Commencing at a stake on the south boundary line of E. Hanford's donation claim, thence east eighty (80) rods, thence north forty (40) rods, thence west eighty (80) rods, thence south forty (40) rods to the place of beginning, containing twenty acres of land.

II. That the value of said land in controversy in this suit exceeds eight thousand dollars.

III. That on the 14th day of October, 1878, for valuable consideration to it paid, the Territory of Washington executed and delivered to Thaddeus Hanford its deed and thereby conveyed to said Thaddeus Hanford, his heirs and assigns, the above described premises in fee simple; which said deed was duly recorded in the office of the Auditor of King County, Washington Territory, on the 25th day of November, 1878; which said deed was executed by said Territory of Washington in pursuance of a sale of said land made by said Territory of Washington as the property of one Lumley Franklin for the non-payment of taxes due thereon by said Lumley Franklin, and which said deed executed by said Territory of Washington as the party of the first part to said Thaddeus Hanford as the party of the second part contained the following contract and agreement between said parties thereto, to-wit:

"Now therefore, the said party of the first part by virtue of the statute in such case made and provided, for the consideration of the sum of money above mentioned paid to the county treasurer of said county, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said Thaddeus Hanford, his heirs and assigns, the said described real estate, together with all and singular the tenements and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof, as well in law as in equity, and the right, title and interest of the said Lumley Franklin and all owners known or unknown, of, in or to the above described premises."

IV. That the said Thaddeus Hanford immediately entered into possession of said premises, paid taxes thereon, improved the same, and remained in possession until the 17th day of September, 1885, when he sold the same to your orator as hereinafter set forth.

V. That the statutes of Washington Territory in force at the date of said tax sale and at the date of the execution of said tax deed by said Territory to said Thaddeus Hanford prohibited the bringing of any suit or proceeding for the recovery of land sold for taxes after the expiration of three years from the date of the recording of the tax deed of sale, except in cases where the tax had been paid or the land redeemed, or where such suit was brought by the purchaser at such tax sale, and provided that the tax deed should be presumptive evidence of the regularity of all former proceedings.

VI. That on the 17th day of September, A. D. 1885, more than three years after the recording of his said tax deed in the office of the Auditor of King County, said Thaddeus Hanford, while in possession of said land, in good faith and for a valuable consideration to him paid by Frank Hanford, executed to said Frank Hanford a deed of said described premises and thereby conveyed said premises in fee to your orator; which said deed was duly recorded in the office of the Auditor of King County on the 13th day of March, 1886.

VII. That your orator purchased said land from said Thaddeus Hanford, in good faith, for valuable consideration and without notice of any claim to said land by any person other than said Thaddeus Hanford, and in making said purchase your orator relied upon the express contract entered into between the Territory of Washington and the said Thaddeus Hanford, above set forth, by virtue of which said land was conveyed to said Thaddeus Hanford and title thereto confirmed in him by said Territory and the laws thereof then existing.

VIII. That immediately thereupon your orator entered into possession of said land and thereafter improved the same, paid the taxes thereon, erected a dwelling-house thereon and held the same for rent, and stored therein the property of his agent and employee.

IX. That on the 26th day of July, 1887, the said Territory of Washington, by W. Finley Hall, its agent, presented the petition of the said W. Finley Hall to the Probate Court of King County, alleging the death of said Lumley Franklin above named; that he left no property in Washington Territory except real estate; that there were no general creditors; that said Franklin was a resident of Victoria, British Columbia, and that he died without the Territory of Washington, and prayed that letters of administration be granted to said W. Finley Hall upon the estate of said Lumley Franklin, but said W. Finley Hall was not of kin to said Lumley Franklin, neither was he a creditor of said Franklin, nor did he act in presenting said petition at the request of any one of kin to said Lumley Franklin or at the request of any of the creditors of said Lumley Franklin.

X. That on the 8th day of August said Probate Court as-

sumed to appoint said W. Finley Hall administrator of said estate, and on the 26th day of said month he filed his inventory showing there were no debts against said estate, no personal assets, and that the said land constituted the sole assets of said estate.

XI. That thereafter, to-wit, on the 26th day of March, 1888, the said Territory of Washington, by its agent and organ, the Probate Court of King County, in violation of the contract above mentioned, entered into between said Territory and Thaddeus Hanford, the grantor of your orator, ordered said land above described to be sold as the property of Lumley Franklin to pay a tax claimed by said Territory from said Lumley Franklin, and thereafter, in pursuance of said order, made a pretended sale of said land and caused to be executed a deed purporting to convey the same to the defendant Griffith Davies, in violation of the contract above set forth between the said Territory of Washington and the said Thaddeus Hanford and the obligation thereof, and in violation of Article 1, Section X, of the Constitution of the United States, and of Sections 1851 and 1891 of the Revised Statutes of the United States.

XII. That in all of his actions the said W. Finley Hall acted as the agent and instrument of said Territory of Washington, and in all of its proceedings the said Probate Court acted as the agent and organ of said Territory for the purpose of collecting said tax claimed by said Territory from said Lumley Franklin; that in all of its said proceedings the said Probate Court acted entirely without jurisdiction and without color of authority save as the agent and organ of said Territory, and said Probate Court and said W. Finley Hall as the agents and organs of said Territory were at the time of their said proceedings fully aware that said land had in good faith and for valuable consideration been sold by said Territory to said Thaddeus Hanford as the property of said Lumley Franklin for the non-payment of taxes thereon by said Lumley Faanklin, and that upon the faith of said sale and the deed executed in pursuance thereof your orator had purchased said land in good faith for valuable consideration and without notice of any claim on the part of said Territory or any person whomsoever from the said Thaddeus Hanford.

XIII. That the deed of said land executed in pursuance of said sale ordered by said Probate Court was taken in the name of said defendant Griffith Davies, but said deed is in fact held for the benefit of the said Griffith Davies and wife, Thomas W. Prosch and wife, and certain other persons whose true names are to your orator unknown, and who are therefore in this bill named as John Doe and Mary Doe, his wife, and Richard Roe and Susan Roe, his wife.

XIV. That the said defendants in purchasing at said sale and when they received said deed had actual and constructive

notice of the title of your orator to said land and of all the facts and circumstances connected therewith, but, in spite of their knowledge and with intent to create a cloud upon the title of your orator to the said land and to force your orator to buy off the adverse claim which said defendants expected to acquire by virtue of said sale and the deed executed in pursuance thereof, conspired together to purchase said land, and in pursuance of said conspiracy did buy in said land at the pretended sale thereof and procured a deed for the same, and thereafter, to-wit, on the 25th day of February, 1889, forcibly entered upon said land and forcibly took possession of said dwelling-house of your orator and maintained said forcible possession until the 1st day of April, 1891, when they vacated the actual possession of said premises, and the same are now in the actual possession of no one, except so far as said abandonment restores the prior possession of your orator.

XV. That the defendants are married persons, and as such set up their pretended claim of title; that the pretended deed of the defendants is of no validity in law or equity and is a cloud upon the title of your orator to said land; that the defendants have no estate, right, title, or interest in said land or the possession thereof, nor have either of them by virtue of said deed or otherwise, and their claim of title is without any right whatever.

Appellees demurred to the bill upon the grounds:

1st, That the bill did not state such a case nor contain any matter of equity entitling appellant to relief. 2d, That the Circuit Court had no jurisdiction in the premises.— Record, folio 15. The demurrer was sustained.— Record, folio 22. Appellant declined to amend his bill, elected to stand upon the same, and, thereupon, a final decree was entered dismissing the bill— Record, folio 23. A certificate of the question of jurisdiction of the Circuit Court was preserved.— Record, folio 24. Appellant in due time filed his petition praying the allowance of an appeal to this Court and filed with the same his assignment of errors.— Record, folios 26–30. His appeal was allowed and his appeal bond approved.— Record, folios 26–32.

The errors assigned by appellant and which constitute appellant's specification of errors in the decree of the Circuit Court, on which appellant relies for reversal, are as follows:

I.

That the bill of complaint of the complainant, the appellant herein, stated a cause within the jurisdiction of the Circuit

Court of the United States for the District of Washington, and said Court erred in holding that it had no jurisdiction of said cause.

II.

That said Circuit Court of the United States for the District of Washington erred in not holding that the bill of complaint of the complainant herein showed upon its face a cause of action within the jurisdiction of said court, because it appeared in said bill that the Territory of Washington had enacted a law impairing the obligation of a contract entered into between said territory and the complainant in this action.

III.

That said Court erred in not holding that the bill of complaint of complainant herein alleged facts showing that said complainant had been deprived of his property without due process of law.

IV.

That said Court erred in not holding that the title of the complainant to the premises described in his said bill of complaint has become an absolute and indefeasible title, and that the decision of the Probate Court of King County, in the Territory of Washington, was in effect a law of the Territory of Washington impairing the obligation of the contract entered into by said territory and the complainant herein and complainant's grantor, and was forbidden by Section 1 of Article 10 of the Constitution of the United States and by the laws of the United States.

V.

That said Court erred in not holding that if the decision of the Probate Court of King County, in the Territory of Washington, was not a law impairing the obligation of a contract entered into between said territory and the complainant herein, the giving effect to said decision by the officers of said territory, whereby complainant was deprived of said property, was depriving complainant of his property without due process of law, was a denial of the equal protection of the laws to complainant, and was a violation of his rights under the Constitution of the United States.

VI.

That said Court erred in not holding that the decision of the Probabte Court of King County, of the Territory of Washington, and the giving effect thereto by the officers of said territory was depriving complainant of a vested right to the premises described in his bill of complaint.

VII.

That said Court erred in not holding that the statute of

limitations of the Territory of Washington in force at the date that said territory executed a deed of the premises described in complainant's bill of complaint to the grantor of complainant herein having been taken by said territory from the State of Wisconsin after said law of said State of Wisconsin had been interpreted by the Supreme Court of said State of Wisconsin and by the Supreme Court of the United States, said interpretation of said law by said Courts became a part of the law of the Territory of Washington, and the complainant's grantor having purchased said property upon the faith of said contract and of said law in force at the date of said contract a subsequent decision of the Court of the Territory of Washington conflicting with and in effect overruling said decisions was a law of the Territory of Washington impairing the obligation of the contract.

VIII.

That said Court erred in not holding that the ordinance of July 13, 1787, entitled "An ordinance for the government of the territory of the United States northwest of the river Ohio," being the law of the Territory of Washington by reason of the extension of said ordinance to said territory by acts of the Congress of the United States, a decision of the Probate Court of King County, in the Territory of Washington, annulling said contract between said territory and complainant, was a law of said territory impairing the obligation of said contract.

IX.

That said Court erred in not holding that the code of Washington Territory of 1881 was a law of the Territory of Washington enacted after the making of the tax deed from said territory to complainant's grantor and the construction of said code by the Probate Court of King County, whereby the said tax deed was annulled, was a law of said territory impairing the obligation of a contract and void.

X.

That said Court erred in not holding that it appearing upon the face of complainant's bill of complaint that the Territory of Washington, having sold to complainant's grantor the premises described in the complaint and having in the deed executed to plaintiff's grantor covenanted that all the right, title and interest of all owners, known or unknown, in or to said premises were sold to plaintiff's grantor, the subsequent sale of said premises for taxes assessed prior to the date of said sale against a person other than plaintiff's grantor or any one claiming under him was a law impairing the obligation of the contract entered into between said territory and the plaintiff's grantor and was in effect depriving the plaintiff of his property without due process of law.

ARGUMENT.

The errors assigned may, for the purposes of condensation, be reduced to three general propositions which will be considered *seriatim*.

I.

That the Circuit Court erred in holding that appellant's bill did not show that the obligation of the contract entered into by and between the Territory of Washington and appellant, set forth in the bill, had been impaired by a law passed by said territory in violation of Section 10, Article 1 , of the Constitution of the United States.

The first question arising under this proposition is whether Section 10, Article 1 , is a prohibition upon the territories as well as upon the states. If there was no legislation on the part of Congress extending the Constitution over the territories, the question whether the territories were included within the prohibition might be answered in the negative.

Hepburn vs. Elzey, 2 Cranch, 445.

Congress, however, has enacted legislation which makes it clear that the prohibition placed upon the states of the Union is also placed upon the territories of the United States. The Revised Statutes of the United States, Section 1851, declares:

"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

Section 1891 declares that:

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized, as elsewhere within the United States."

The foregoing sections extend to the inhabitants of the territories the protection of the Constitution of the United States as fully as the Constitution itself extended it to the people of the states. No other meaning can be given to Section 1891 than that the provisions of the Constitution, and the laws of the United States, which are not locally inapplicable to the territories, shall have the same force and effect in the territories as in the states; for as the territories organized and the terri-

tories to be thereafter organized include all the territories, the word "elsewhere" must refer to that part of the United States not within the territories, viz: the states. Is, then, the prohibition against the impairment of the obligation of a contract by a law of the state, a provision of the Constitution locally inapplicable to a territory? It is perfectly clear that as great a wrong is done when the obligation of a contract is impaired by a law passed by a territory, as when by a law of a state. Moreover, in the organic act of Oregon Territory, approved August 14, 1848, United States Statutes at Large, Volume 9, page 323, and which was continued in force in Washington Territory by Section 1952 of the Revised Statutes, it was enacted by Congress:

Section 14. "That the inhabitants of said territory shall be entitled to enjoy all and singular the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the River Ohio, by the articles of compact contained in the ordinance for the government of said territory, on the thirteenth day of July, seventeen hundred and eighty-seven, and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of said territory."

Article 2 of said ordinance declares:

"And in the just preservation of rights and property, it is understood and declared that no laws are ever to be made or have force in the said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud, previously formed."

It is evident, therefore, that Congress deemed it proper to restrain the territories of Oregon and Washington from passing a law impairing the obligation of a contract. It is plain, therefore, that Congress deemed a restraint placed upon the states of the Union, a restraint proper to be placed upon the territories. The provision of the Constitution restraining a state from passing a law impairing the obligation of a contract is, therefore, not inapplicable to the territories. It is, therefore, submitted, that by Sections 1851 and 1891 of the Revised Statutes, Congress intended the word "State" in Section 10, Article 1, of the Constitution, to include in meaning the word "Territory."

De Geofroy vs. Riggs, 133 U. S., 258–268.
Talbott vs. Board of County Commissions, 139 U. S., 438.

Assuming that the territories, equally with the states, are prohibited by the Constitution of the United States from passing a law impairing the obligation of contracts, the next question is whether the bill alleges facts showing that the Territory of Washington has passed a law impairing the obligation of the contract entered into between said territory and appellant's grantor. The bill alleges that appellant is the owner of the land described therein, that the land was conveyed by deed to appellant's immediate grantor on the 14th day of October, 1878, by the Territory of Washington, in pursuance of a sale of said land made by said territory, as the property of Lumley Franklin, for taxes levied thereon, and in which deed said territory, as party of the first part, contracted as follows:

"Now, therefore, the said party of the first part, by authority of the statute in such case made and provided, for the consideration of the sum of money above mentioned, paid to the county treasurer of said county, has granted, bargained, sold and conveyed and by these presents does grant, bargain, sell, convey and confirm unto the said Thaddeus Hanford, his heirs and assigns, said described real estate, together with all and singular the tenements and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof, as well in law as in equity, and the right, title and interest of the said Lumley Franklin and all owners known or unknown, of, in or to the above described premises."

The statute law of Washington Territory in force at the date of the sale and at the date of the execution of said deed, contained the following provision which must be read into said deed as a part of the contract made by the Territory, viz:

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid, or the land redeemed, as provided by law, shall be commenced within three years from the time of recording the tax deed of sale and not thereafter, except by the purchaser at the tax sale."

Laws of Washington, 1869, p. 176.

The foregoing section was taken from the statute of Wisconsin. The statute of Wisconsin was as follows:

"Any suit or proceeding for the recovery of land sold for taxes, except in cases where the taxes have been paid or the land redeemed, as provided by law, shall be commenced within

three years from the time of recording the tax deed of sale and not thereafter."

Revised Statutes of Wisconsin of 1849, Chap. 15, Sec. 123, p. 164.

The adoption of said statute by Washington Territory did not, however, take place until after the statute had been construed by the Supreme Court of Wisconsin and by this Court.

Leffingwell vs. Warren, 2 Black, U. S., 599.
Coulter vs. Stafford, 48 Fed. Rep., 266. Overruled in 56 Fed. Rep., 564.

The construction which had been placed upon the statute by this Court and the Supreme Court of Wisconsin should, upon an elementary principle, be deemed adopted as a part of the statute itself; but, in the case at bar, we are not compelled to resort to a presumption as to the intention of the Legislature. At the time this Court decided Leffingwell vs. Warren, *supra*, it was the court of last resort in cases arising in Washington Territory; and when Washington Territory adopted the above mentioned statute, it adopted it with the meaning given it by this Court, and that meaning became a part of the statute as fully as though, after its enactment, a case from Washington Territory had come to this Court and the statute had by this Court been construed.

In Leffingwell vs. Warren, *supra*, this Court, after reciting the Wisconsin statute, and the cases excepted from its provisions, said :

"This case does not fall within either of these exceptions. We have no power to add to them. To do so would be to usurp the function of another and distinct governmental department. It would be legislation and not adjudication. * * * The lapse of time limited by such statutes not only bars the remedy but it extinguishes the right and vests a perfect title in the adverse holder."

In the case at bar, the bill alleges that the deed to appellant's grantor was recorded in the office of the Auditor of King County, Washington Territory, on November 25, 1878, and that the grantee named in said deed immediately entered into possession of said premises, improved the same, paid taxes thereon and remained in possession until appellant purchased said premises.

The bill further alleges that in September, 1885, more than three years after recording the tax deed, appellant in good faith, for valuable consideration, relying upon the contract entered into between the territory and his grantor and the laws of said territory then existing confirming the title of his grantor, purchased said property from the grantee of the territory, received a deed therefor and entered into possession of said land. The bill also further alleges that in July, 1887, the Territory of Washington, by its agent, one W. Finley Hall, applied to the Probate Court of King County for letters of administration upon the estate of Franklin, alleging the death of Franklin out of the Territory of Washington, that he was a resident of British Columbia, that he left no property in Washington Territory except real estate — the land in question; that said application was not made in behalf of any creditor of Franklin or any relative of Franklin, but was made by said Hall as the agent of Washington Territory. The Court granted the letters of administration. In March, 1888, said Court as the agent of the territory and without any jurisdiction, ordered and caused to be sold the land in question, as the land of Lumley Franklin, to satisfy a tax claimed by said territory from the said Franklin, and in pursuance of said sale, caused to be executed to appellee, Griffith Davies, the deed under which appellees claim title and which appellant claims is a cloud upon his title.— Folios 4, 5 and 6.

It is perfectly plain that had the Legislature of the Territory of Washington enacted a law by which the property, sold by the territory to appellant's grantor as the property of Franklin, was restored to Franklin, such statute would be within the constitutional prohibition.

"A grant in its own nature amounts to an extinguishment of the right of the grantor and implies a contract not to reassert that right. A party is therefore always estopped by his own grant. * * * A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of conveying the property by conveyances."

Fletcher vs. Peck, 6 Cranch, 87-137.

Wright vs. Nagle, 101 U. S., 791.

In the case at bar, the Territory, by reason of the law, contracted with appellant's grantor that, upon the expiration of three years from the recording of the tax deed, no action should be maintained for the recovery of the land. The three years expired. Appellant purchased the land on the faith of the Territory's contract. The statute had been construed by this Court prior to appellant's purchase, and that construction was that the statute vested in appellant's grantor absolute title to the land.

The Probate Court, as the agent of the Territory, in a proceeding to which appellant was not a party, sold the land as though title was still in Franklin. The action of the Probate Court, if given effect, takes the property of Hanford and re-vests it in Franklin. Appellant having purchased the property, after the expiration of three years from the date of recording the tax deed and after the statute of limitations of the Territory of Washington had been interpreted by this Court to vest absolute title in the grantee of the Territory upon the expiration of such period, the decision of the Probate Court ordering the property to be sold as the property of Franklin, was a law of the Territory impairing the obligation of the contract entered into between the Territory and appellant's grantor.

Olcott vs. Supervisors of Fond du Lac County, 16 Wall., 678.
Havermeyer vs. Iowa City, 3 Wall., 294.
Gelpcke vs. Dubuque, 1 Wall., 175.
Ohio Life Ins. & Trust Co. vs. Debolt, 16 How., 416.
Butz vs. Muscatine, 8 Wall., 575.
Douglas vs. County of Pike, 101 U. S., 677 687.
Louisiana vs. Pillsbury, 105 U. S., 278.

The section of the act of 1869, quoted above, was re-enacted in the Code of Washington Territory and became Section 2939 of the Code of 1881. It was not until March 26th, 1888, that the Probate Court ordered the land in question to be sold. If the Probate Court held that that section, as re-enacted, did not vest title absolutely in appellant's grantor, upon the expiration of three years from the recording of the tax deed, and it must have so held in order to render the judgment which it did render, its decision was in effect to construe the re-enactment as a repeal of the original section, and was consequently, a law impairing the obligation of the contract.

II.

The Circuit Court erred in holding that appellant's bill did not allege facts showing that appellant had been deprived of his property without due process of law.

It is respectfully submitted that the bill clearly shows that appellant has been deprived of his property without due process of law, if the order of the Probate Court and the sale thereunder be sustained.

As stated in the argument upon the preceding proposition, upon the expiration of three years from the date of the recording of the tax deed from the territory to appellant's grantor, the title became absolute in such grantor, except upon certain contingencies not involved in the case at bar. Appellant's grantor recorded his deed and maintained possession of the land thereafter, for nearly seven years, when he sold the land to appellant, who entered into possession of the same. Appellant, therefore, had a vested title in the land.

"When the period prescribed by the statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference as it would have been had it been perfected in the owner by grant, or by any species of assurance."

Cooley on Constitutional Limitations, 5th Edition, top page 449.
Holden vs. James, 11 Mass., 396.
Wright vs. Oakley, 5 Met., 400.
Lewis vs. Webb, 3 Me., 326.
Atkinson vs. Dunlap, 50 Me., 111.
Davis vs. Minor, 2 Miss., 183.
Hicks vs. Steigleman, 49 Miss., 377.
Knox vs. Cleveland, 13 Wis., 245.
Sprecker vs. Wakeley, 11 Wis., 432.
Pleasants vs. Rohrer, 17 Wis., 577.
Moor vs. Luce, 29 Penn. St., 260.
Morton vs. Sharkey, McCahon, 113.

McKinney vs. Springer, 8 Blackf., 506.
Bradford vs. Brooks, 2 Aik., 284.
Stipp vs. Brown, 2 Ind., 647.
Briggs vs. Hubbard, 19 Vt., 86.
Wires vs. Farr, 25 Vt., 41.
Woart vs. Winnick, 3 N. H., 473.
Rockport vs. Walden, 54 N. H., 167.

"The English and American statutes of limitation have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title — a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this Court. Leffingwell vs. Warren, 2 Black, 599; Croxall vs. Shererd, 5 Wall., 289; Dickerson vs. Colgrove, 100 U. S., 583; Bicknell vs. Comstock, 113 U. S., 152. It is the doctrine of the English courts and has been often asserted in the highest courts of the States of the Union."

Campbell vs. Holt, 115 U. S., 620.

The bill alleges that appellees claim title to the land in question under a deed executed in pursuance of a sale of the land ordered by the Probate Court to be made as the land of Lumley Franklin. The bill further alleges that the Probate Court acted entirely without jurisdiction in all of its proceedings and with knowledge of its want of jurisdiction. The allegations showing the want of jurisdiction in the Probate Court proceedings, upon which appellees rest their title, are set forth in paragraphs 9, 10, 11 and 12 of the bill above set forth. The substance of those allegations is as follows:

That in July, 1887, many years after the land had been sold to appellant's grantor and nearly nine years after the deed had been recorded, the Territory of Washington, by its agent, one W. Finley Hall, presented a petition to the Probate Court of King County, alleging the death of said Franklin out of the territory; that Franklin was a resident of British Columbia; that there were no general creditors and that Franklin left no property in the Territory of Washington, except real estate; that said Hall was not a creditor of Franklin, nor was he of kin

to Franklin, nor did he act in behalf of any creditor or kin of Franklin. That on the 8th day of August, 1887, said Court assumed to appoint Hall administrator of said estate. On the 20th of August, 1887, Hall filed his inventory showing that there were no debts against said estate, no personal assets and that the land in controversy constituted the sole assets of said estate. That thereafter, the Probate Court ordered the land to be sold as the property of Franklin to pay a tax claimed by the territory from Franklin, and thereafter, caused such sale to be made and the deed executed to the appellee, Griffith Davies. That said Hall and the Probate Court, in all of said proceedings, acted as agent of the territory for the purpose of collecting said tax. That said Hall and said Court, at the time of said proceedings, were fully aware that said land had been sold to appellant's grantor as the property of Franklin for non-payment of taxes and that appellant had in good faith, for valuable consideration, and without notice of any claim on the part of any person claiming adversely, purchased said land. That appellees had actual notice of appellant's title, but with intent to create a cloud upon appellant's title, purchased at the probate sale. Folios 4, 5, 6.

If the facts alleged in the bill to show a want of jurisdiction in the Probate Court, do show a want of jurisdiction in that Court, its proceedings were void, and to uphold them would result in the territory having deprived appellant of his property without due process of law.

In Scott vs. McNeal, 154 U. S., 34, this Court said:

"The Fourteenth Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains: 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislature, its executive, or its judicial authorities. Virginia vs. Rives, 100 U. S., 313, 318, 319; *Ex parte* Virginia *Id.*, 339, 346; Neal vs. Delaware, 103 U. S., 370, 397."

In Scott vs. McNeal, *supra*, this Court, in reversing the judgment of the Supreme Court of the State of Washington, which sustained a sale ordered by the Probate Court of Thurston County, in the Territory of Washington, of the real estate of

a living man, upon whose estate letters of administration had been granted, said:

"No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

This Court held that the judgment of the Probate Court was void, because it was not due process of law, and that the sale made thereunder conveyed no title. The question then, in the case at bar, is, had the Probate Court of King County, in the Territory of Washington, jurisdiction to grant letters of administration upon the estate of Franklin, and if so, had it jurisdiction to order a sale of the land of appellant to satisfy a claim of the territory against Franklin?

A probate court is a court of special and limited jurisdiction, deriving all of its authority from statute.

Hershberger vs. Blewett, 55 Fed. Rep., 170.
Hendricks vs. Cleaveland, 2 Vt., 330.
Smith vs. Rice, 11 Mass., 507.
Sumner vs. Parker, 7 Mass., 79.
Woodward vs. Lincoln, 91 Mass., 239.
Hanscom vs. Marston, 19 Atl. Rep., 460 (Me.).
Davis vs. Davis, 11 Ohio St., 386.
Saylor vs. Simpson, 12 N. E. Rep., 181 (Ohio).
In re Marston, 8 Atl. Rep., 87 (Me.).
Overseers vs. Gullifer, 49 Me., 360.
Towle vs. Coe, 63 Me., 248.
Levering vs. Levering, 2 Atl. Rep., 3 (Md.).
Brodess vs. Thompson, 2 Har. & G., 120 (Md.).
State vs. Warren, 28 Md., 338.
Townsend vs. Brooke, 9 Gill, 90 (Md.).
Wood vs. Stone, 39 N. H., 573.
Dakin vs. Hudson, 6 Cowen (N.Y.), 221.
Francis vs. Northcote, 6 Texas, 186.
Henry vs. Keays, 12 La., 214.
Erwin vs. Lowry, 1 La. An., 276.
Bevan vs. Cooper, 72 N.Y., 327.
Hanner vs. Silver, 2 Oregon, 337.
Coil vs. Putnam, 46 Mo., 51.
Chadwick vs. Chadwick, 13 Pac. Rep., 385 (Mont.).
Moore vs. Koubly, 1 Idaho, 55.
Carr vs. Catlin, 13 Kansas, 404.

In Scott vs. McNeal, *supra*, this Court said, speaking of probate courts:

"All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect, being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons, of full age and sound mind, or to determine that a living man is dead and thereupon undertake to dispose of his estate. A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the Court has no jurisdiction over his estate; and not because its decision upon the question, whether he is living or dead, can in anywise bind or estop him, or deprive him while alive, of the title or control of his property."

The determination by a probate court that the person, whose estate is sought to be administered, is dead, when such person is in fact, alive, does not give the court jurisdiction, if such fact does not exist.

We submit that it is equally essential to the jurisdiction of a probate court that there should exist as a fact, an estate of a deceased person within the limits of the jurisdiction of the Court. It is the existence of the fact of such an estate, and not the determination by the Court of its existence, which gives the Court jurisdiction. There must not only be in fact, a decedent, but there must be an estate of such decedent within the jurisdiction of the Court, or there is nothing upon which letters can issue. The statute of the Territory of Washington, at the time the proceedings in the Probate Court, set forth in the bill, were had, was as follows:

Code of 1881, Section 1340:

"Wills shall be proved and letters testamentary or of administration shall be granted:

1. In the county of which deceased was a resident or had his place of abode at the time of his death.

2. In the county in which he may have died, leaving estate therein, and not being a resident of the territory.

3. In the county in which any part of his estate may be, he having died out of the territory and not having been a resident thereof at the time of his death."

Section 1341:

"When the estate of the deceased is in more than one

county, he having died out of the territory, and not having been a resident thereof at the time of his death, the probate court of that county in which application is first made for letters testamentary or of administration, shall have exclusive jurisdiction of the settlement of the estate."

The bill shows that Franklin died out of the territory and was not a resident thereof, but was a resident of British Columbia. The Probate Court of King County then had jurisdiction to grant letters of administration upon his estate only in the event that a part of his estate was situate in said King county.

In American Law of Administration, Woerner, Sec. 205, the law is stated as follows:

"No administration can be granted in the case of a deceased non-resident, unless he left property within the jurisdiction of the court making the appointment."

Christie vs. Vest, 36 Iowa, 285.
Jeffersonville Railroad Co. vs. Swayne, 26 Ind., 477.

A court of probate must indeed inquire into and be satisfied of the fact that the deceased left property within the jurisdiction of the court to which application is made for the grant of letters, in the same manner that it must inquire into and be satisfied of the fact of the death of such person, because without that fact, the court has no jurisdiction, but its determination that such fact exists when it does not exist does not give it jurisdiction.

The decision in Perry vs. St. Joseph & W. R. Co., 29 Kan., 299, fully sustains this proposition.

The statute of Kansas, Sec. 1, Chap. 37, Compiled Laws 1879, reads as follows:

"That upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death, and when any person shall die intestate in any other state or country, leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered; and the administration which shall be first lawfully granted in the last mentioned case, shall extend to all the estate of the deceased within the state and shall exclude the jurisdiction of the probate court in every other county."

In construing the statute, the Supreme Court of Kansas used the following language:

"If the deceased was not an inhabitant or resident of this state at the time of her death, and if she left no estate to be administered within this state, and none came into it afterwards, then the probate court of Doniphan county had no jurisdiction to issue letters of administration on the estate of the deceased, or to appoint the plaintiff her administrator, and all its acts in doing so are void *in toto*. It has been decided in many cases that administration granted on the estate of a person not really dead is totally void. Stephenson vs. Superior Court, 15 Reporter, 140; Griffith vs. Frazier, 8 Cranch, 23; Williams, Ex'rs (Amer. Notes, Perkins), 632, and notes to page 631. The jurisdiction of the probate court of Doniphan county to issue letters of administration is derived from the provisions of the statute, and can be only exercised under the circumstances and in the cases provided for thereby. Therefore, if the deceased, not being an inhabitant or resident of this state at the time of her death, left no estate to be administered within this state, and none comes into it afterwards, that court, under the statute, has no jurisdiction to grant administration. But it is said that the probate court had jurisdiction to ascertain whether as a fact the deceased left any estate in Kansas, and its judgment granting letters of administration is conclusive until revoked or reversed. Where the jurisdiction of a court is conceded, as a rule its judgment is conclusive of all matters involved; but if the jurisdiction be disproved, then the judgment is void for all purposes. Mastin vs. Gray, 19 Kan., 458, and the cases there cited; Melia vs. Simmons, 45 Wis., 334; Moore vs. Smith, 11 Rich. Law, 569.

"Now, the Probate Court of Doniphan County had no authority to grant letters of administration unless the deceased left an estate in that county; and it will not do to say that the finding of that fact by the Court is conclusive of its own jurisdiction, for this would be, to use a common expression, 'reasoning within a circle.' The probate court of that county, we suppose, assumed that the deceased had left an estate to be administered, and thereupon appointed the plaintiff administrator. But the letters in this case are no more valid, and the appointment of an administrator no more effective, than if the Probate Court of Doniphan County had granted letters of administration upon her estate when in fact she was not dead. In either case, the appointment of an administrator would be void for all purposes; and as in this case the jurisdiction of the Probate Court rests upon the fact of an estate belonging to the deceased in Kansas, if the defendant can clearly show that the deceased died without leaving any estate of any kind, it must result that the entire proceedings before the Probate Court were

without jurisdiction, and void. D'Arusmart vs. Jones, 11 Cent. Law J., 253; Thompson vs. Whitman, 18 Wall., 457; Jochumsen vs. Bank, 3 Allen, 87."

Inasmuch as the bill alleges, that at the time the probate proceedings were had, in pursuance of which the land was sold as the property of Franklin, the title to the property was in appellant, and as the bill shows that the probate proceedings disclose the fact that there was no estate of Franklin within King County or within the State of Washington, the Probate Court of King County had no jurisdiction to grant letters of administration. As the Probate Court had no jurisdiction to grant letters of administration, all subsequent proceedings were void.

To uphold the proceedings of the Probate Court would be to determine that the title of appellant to the property was divested by the sale made in pursuance of the order of the Probate Court. To so hold would be to deprive appellant of his property without due process of law.

Scott vs. McNeal, supra.

If it should be conceded, for the sake of argument, that the Probate Court had jurisdiction to grant letters of administration, the conclusion cannot be escaped that it had no jurisdiction to order a sale of the property in question.

The grant of jurisdiction to the probate courts of the Territory of Washington was contained in Section 1907 of the Revised Statutes of the United States, and the power therein granted is probate jurisdiction.

All chancery and common law jurisdiction was vested in the Supreme Court and in the district courts of the territory.

R. S. U. S., Sections 1866–1868.
Ferris vs. Higley, 20 Wall., 375.
Locknane vs. Martin, 1 Kan., 495.
Dewer vs. Dyer, 1 Kan., 507.
Moore vs. Koubly, 1st Idaho, 55.
Chadwick vs. Chadwick, 13 Pac. Rep., 385.

"Jurisdiction of all probate and testamentary matters may be completely exercised without possessing the power to order the sale of lands of an intestate. Such jurisdiction does not

appear to us to be identical with that power or to comprehend it."

Bank of Hamilton vs. Lessee of Dudley, 2 Peters, 492.

"The power to order the sale of real estate to enforce the payment of a decedent's debts, if the personal estate is insufficient, is ascribed to chancery courts and is generally exercised by them upon the application of creditors in those states in which such jurisdiction is not vested exclusively in the probate courts."

Am. Law of Adm. Woerner, p. 1022, Secs. 463–464, and cases cited in note 1.

Of course, where the Legislature has power to create a probate court and to define its jurisdiction, it can invest a probate court with chancery powers, but where a probate court is created by act of Congress, an act of the Legislature of the territory could not invest it with chancery jurisdiction because Congress has limited its jurisdiction to matters of probate, and matters of probate do not include the exercise of chancery jurisdiction.

In no event, however, had the probate court jurisdiction to sell land which was not a part of the estate of the decedent. The land in question was appellant's. It was not an asset in the hands of the administrator.

Withers vs. Patterson, 27 Texas, 491.
Heath vs. Wells, 5 Pick., 139.

If the proceeding in the probate court should be regarded as one *in rem*, it would be of no binding force against appellant.

The Mary, 9 Cranch, 126.
Hollingsworth vs. Barbour, 4 Peters, 466-475.
Pennoyer vs. Neff, 95 U. S., 714-727.
Rose vs. Himely, 4 Cranch, 241-269.
Thompson vs. Whitman, 18 Wall., 457.
Scott vs. McNeal, supra.
Windsor vs. McVeigh, 93 U. S., 274.

The statute of the Territory of Washington providing for the sale of a decedent's real estate for the payment of his debts, provided as follows (Code of 1881):

"Section 1493. When the personal estate in the hands of

the executor or administrator shall be insufficient to pay the allowance to the family, and all the debts and charges of the administration, the executor or administrator may sell the real estate for that purpose, upon the order of the probate court. To obtain such order he shall present a petition to the court setting forth the amount of the personal estate that has come to his hand, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased, which petition shall be verified by the oath of the party presenting the same.

Section 1494. If it shall appear by such petition that there is not sufficient personal estate in the hands of the executor or administrator to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration, and that it is necessary to sell the whole or some portion of the real estate, for the payment of such debts, the probate court shall thereupon make an order, directing all persons interested, to appear at a time and place specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order shall not be granted to the executor or administrator to sell the real estate of the deceased, or so much thereof as shall be necessary, to pay such allowances, charges and debts."

It is clear that those sections provided for a sale of the real estate only in the event of the personal property being insufficient to pay the debts, the family allowance and the costs of administration.

In the case at bar the probate proceedings showed, as appears by the bill, that there were no debts. The proceedings further showed that the sale was made solely for the purpose of enabling the territory to collect a tax which it claimed from Franklin, but the proceedings also showed that Franklin was a non-resident. The tax claimed by the territory was, therefore, not a debt of Franklin's.

"Where a non-resident is the owner of tangible property within the state and the state imposes taxes upon it, the tax is not a charge against the owner personally, but must be enforced against the property itself. The state has no jurisdiction to assess a tax as a personal charge against non-residents."

Cooley on Taxation, 2d Ed., 21.

If the land sold to pay the tax was the property of appellant, and the demurrer admits it to have been, of course all the probate proceedings were void; but even had the property been the property of Franklin, there was no jurisdiction given to the Probate Court to entertain proceedings for the collection of a tax, especially in view of the tax not being a debt. If the tax was not a debt of Franklin's, no sale could be made by the Probate Court in order to pay it.

"Proceedings to sell real estate for the payment of the debts of a deceased cannot be maintained where an action would not lie upon the original indebtedness."

Wendell on Disposition of Decedents' Estates, p. 24.

"Unless it appears from its (the petition's) averments that debts which the decedent had contracted during his lifetime are still unpaid, and that there are no personal assets sufficient to discharge them but real estate which is liable for their payment, the court will have no power to order or license such sale, and therefore, any order so made and any sale thereunder must be void."

Woerner on Adm., p. 1035.

"Where there are no debts due by a decedent, there can be no sale of lands of his estate to pay the expenses of an administration had thereon. * * * In every case, however, where an application is made to sell lands for the expense of administering the estate only, it must be made to appear that the expenses were incurred in the course of administering the estate to pay debts due personally by the decedent."

Mays vs. Rogers, 52 Arkansas, 320.

"No sale of real estate will be ordered to pay expenses of administration alone, if there are no debts of decedent."

Real Property Trials by Malone, 738.

"By statute, all the property of a decedent except such as is declared exempt, is charged with the payment of his debts and may be sold for the payment of the same. This charge the personal representative cannot defeat by a distribution of the lands among the heirs or devisees, before the debts are paid. The statute, however, has been construed as charging the lands with debts owing by the decedent at the time of his death, and it has been held that they cannot be sold to pay the cost and expense of administration when no debts of the decedent are

shown, for the payment of which the lands are liable, under the statute."

Garrett vs. Garrett, 64 Ala., 263.
Sermon vs. Black, 79 Ala., 507.
Beadle vs. Steele, 86 Ala., 413.

"The debts so proved to exist must be such as were contracted by the deceased himself. No sale of real estate will be ordered to pay expenses of administration alone, or any debts incurred by the executor or administrator after the death of the deceased or intestate, except funeral expenses. It has been so held in Alabama, Illinois, Massachusetts, Mississippi, Missouri, New York and Pennsylvania. In Maine, the legality of a sale for the payment of expenses has been questioned, but there is no direct adjudication upon the point. No decision has come to the notice of the writer from any of the states, in which the sale of real estate for the payment of the expenses of administration alone, is held valid, except an intimation in a very briefly considered case in Indiana, a dictum in New Jersey and a case in California, in which the refusal to order the sale of real estate to pay the costs incurred in litigation concerning the will, was held error."

Woerner on Administration, p. 1039.

Whatever view might be taken of the jurisdiction of the Probate Court to sell the land if it had been a part of the estate of Franklin, the Probate Court was entirely without jurisdiction to determine the question of title as between the administrator of Franklin and this appellant. This appellant cannot be bound by any judgment which the Probate Court rendered in that proceeding, for had this appellant appeared in that proceeding, he could not have conferred jurisdiction upon the Probate Court by an express consent to its assumption of jurisdiction to determine the question of title between the administrator and this appellant.

In Stewart vs. Lohr, 1 Washington, 341, the Supreme Court of Washington said, speaking of the probate courts of the territory:

"That the probate court is without jurisdiction to try title to property as between representatives of an estate and strangers thereto, is too well established by the authorities to require argument.

"*See Schouler Exrs. and Admrs., Sec. 236.*
"*Lynch vs. Divan, Exr., 66 Wis., 490.*

" Budd vs. Hyler, 27 N. J. Law, 43.
" Snodgrass vs. Andrews, 30 Miss., 472.
" Theller vs. Such, 57 Cal., 447."

The Probate Court was, therefore, in every view of the case, clearly without jurisdiction, and its judgment was void.

United States vs. Walker, 109 U. S., 258.

The judgment of the Probate Court was, therefore, a nullity, and its sale of appellant's property thereunder, if upheld, would deprive him of his property without due process of law, in violation of Sec. 1, of the 14th Amendment to the Constitution of the United States.

III.

The Circuit Court erred in holding that the suit was not one within its jurisdiction.

This is a case involving the construction and application of the Constitution of the United States. This Court, therefore, has jurisdiction of the entire case and of all questions involved in it and not merely of the constitutional questions.

Act of March 3rd, 1891, Chap. 517, Sec. 5.
26 Statutes at Large, pp. 826-828.
Chappell vs. U. S., 16 Supreme Court Rep., p. 395, decided January 6th, 1896.
Nishimura Ekui vs. U. S., 142 U. S., 651.
Horner vs. U. S., 143 U. S., 570-577.
U. S. vs. Jahn, 155 U. S., 109, 112, 113.

The question of the jurisdiction of the Circuit Court depended on whether the bill showed that the case was one arising under the Constitution or laws of the United States. The argument advanced in support of the two preceding propositions is applicable to this proposition. The bill showed upon its face, that appellant had been deprived of the protection of Section 10, Article 1 of the Constitution of the United States; of Sec. 1 of the 14th Amendment to the Constitution, of Secs. 1851 and 1891 of the Revised Statutes of the United States, and of Art. 2 of the Ordinance of July 13th, 1787, entitled: "An ordinance for the government of the territory northwest of the River Ohio."

The right of appellant to the relief prayed for depends upon the determination of those questions. One construction of the

Constitution will grant him relief, another will deny him relief. The Circuit Court, therefore, had jurisdiction of the suit.

"Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or laws of the United States or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States.—Osborn vs. Bank, 9 Wheat., 738; Starin vs. City of New York, 115 U. S., 248."

Cooke vs. Avery, 147 U. S., 375.
Coosaw Mining Co. vs. State of South Carolina, 144 U. S., 550.
State vs. Coosaw Mining Co., 45 Fed. Rep., 804; 47 Fed. Rep., 225.

The bill showed that at the time it was filed, the land was unoccupied. The Statute of Washington authorizes a suit to quiet title by a party not in possession, when the land is unoccupied.

"Any person in possession by himself or his tenant, of real property * * * or when such real property is not in the actual possession of anyone * * * may maintain a civil action against any person or persons, corporations or associations claiming an interest in said real property, or any part thereof, or any right thereto, adverse to him, them, or it, for the purpose of determining such claim, estate or interest."

Code of Washington Territory, 1881, Sec. 554.
Spithill vs. Jones, 3 Washington, 290.

The requisite of possession was, therefore, dispensed with in the Circuit Court.

Holland vs. Challen, 110 U. S., 15–25.
Reynolds vs. Bank, 112 U. S., 405–411.
Frost vs. Spitley, 121 U. S., 552.
Moore vs. Steinbach, 127 U. S., 70.

It is therefore respectfully submitted that the Circuit Court erred in dismissing appellant's bill; that its decree should be reversed and the defendants required to answer.

GEORGE DONWORTH AND
JAMES B. HOWE,
Counsel for Appellant.

Office Supreme Court U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

FRANK HANFORD, *Appellant*,

vs.

GRIFFITH DAVIES, *et al.*, *Respondent.*

No. 259

Appeal From the United States Circuit Court, District of Washington, Northern Division.

BRIEF ON THE MERITS FOR RESPONDENTS.

JAMES HAMILTON LEWIS,
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NEWMAN & MOULTON, PRINTERS, SEATTLE

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Appeal From the United States Circuit Court, District of Washington, Northern Division.

BRIEF ON THE MERITS FOR RESPONDENTS.

JAMES HAMILTON LEWIS,
Attorney for Respondents.

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The respondent in nowise waiving but insisting upon the merits of their motion to dismiss this appeal:

This action is brought to have adjudged void the action of the Probate Court of the Territory of Washington directing a sale of land belonging to the estate of Lumley Hall, and to have declared as null and as a cloud deed given the grantees, the defendants herein, on

the ground that the same is in violation of the provisions of the Constitution declaring that no state shall make any law impairing the obligation of contracts. There is no diversity of citizenship shown or claimed. There is no right or privilege claimed under any Federal law by which title is claimed. No allegations that the court was not one duly appealable from to the highest Court of the Territory.

To the bill there was a general and special demurrer filed, urging:

(a) That there was no jurisdiction in the United States Circuit Court to hear the bill, or to take cognizance of its alleged matters, *i. e.*, there was no Federal question.

(b) That the bill stated no facts sufficient to give relief in equity, *i. e.*, it offered a judgment duly rendered to be assailed by collateral attack.

(c) It was manifest that the matters complained of were but the construction of a statute, which was a part of the contract of appellant in purchasing, and he was therefore in equity estopped to complain of its effect irrespective of the consequence.

The demurrer was sustained by the Court on the first question that there was no jurisdiction, because no Federal question.

We insist that the demurrer should be sustained and the judgment affirmed, and submit the following reasons:

I.

The complaint is barren of allegations explaining how the matters complained of are in violation of Article I., Section 4, of the Constitution of the United States, or of Sections 1851 and 1891 of the Revised Statutes of the United States. No facts are alleged to show what part of the acts, or what phase of the constitutional provision is violated.

Looking alone to the opinion of the lower court to ascertain what the contention was, we perceive it is contended that the acts complained of are in violation of Section 10, of Article I., of the United States Constitution, inhibiting the enactment of state laws that shall impair the obligation of contracts.

(a) *Does the inhibition apply to a Territory?*

Admitting for argument that it is *legislation*, (not decision upon the construction of legislation, the real ground of the complaint, but) legislative enactment, then it is apparent that the enactment mentioned was one of the *Territory of Washington* by its *Territorial Legislature* in and prior to the year 1875 (the Territory being admitted as a state in 1889.)

Does this legislation come within the provision of the Federal Constitution? We think not, because the object of the constitutional inhibition was a mere limitation upon the several sovereignties, to prevent states which otherwise were sovereign and free from any congressional supervision or control from doing that which might affect injuriously a legal obligation.

Cooley on Constitutional Limitations, page 19.

Now this general inhibition and limitation by its terms affected only the states. It does not operate upon the Federal government. The Territories are mere "municipal corporations" of the Federal government. Limitations upon their legislative power must be sought for in the legislation of Congress relating to them. Acts of Territorial Legislatures are to be submitted for approval to Congress, and only when approved become law.

See Acts of Congress, 1852–3, 5 Statutes at Large, page 13 and page 237, section 6.
U. S. Revised Statutes, section 1850.

When such acts were not *disapproved* they were in contemplation of the law *approved* by Congress, as has been held by this Court.

Clinton vs. Englebrecht, 13 Wall. 445–446.
Miners' Bank of Dubuque vs. State of Iowa, 12 How. 1–5.

Of what use was the supervision of Congress over the laws if it were not of restraint? Now there is *no inhibition on Congress to pass any legislation as to mere contracts*, nor to allow Territorial Legislatures so to do.

National Bank vs. Yankton, 101 U. S. 129.
Mormon Church vs. U. S., 136 U. S. 3–4.
Cope vs. Cope, 137 U. S. 683.

The construction by a Territorial Court of last resort of a statute of such territory will be followed by the Federal Courts.

Sweeney vs. Lomme, 22 Wall. 208.

As to the Territories we insist that even if the legislation is such as to impair any existing obligation of contract and is approved by Congress, it is not in violation Sec. 10, Art. I., of the Constitution. It may be in a particular case obnoxious to the general rule forbidding laws of a retroactive nature or possessing features of confiscation, so that the Courts upon upon the particular facts would hold the law inapplicable. But the law is not therefore void or unconstitutional. It may be perfectly good as to future transactions.

Miners' Bank vs. Iowa, supra.

II.

There is no Federal question.

Assuming from the opinion of the Lower Court, as contained in the transcript, that the contention was and is the violation of Section 10, Article I., United States Constitution, saying no state shall pass any law impairing the obligation of contracts, and assuming that the legislature of the Territory of Washington can be included within this inhibition, it is to be noted that no *passing* or *enactment* of *legislation* is complained of, but only the *construction of legislation by the Court's decision.*

See Complaint, trancript, page 3, paragraph 11.

To-wit: "That afterwards, to-wit: . . . the *Territory* of Washington by its agent and organ, the *Probate Court* of King County . . . did order," etc.,

See Transcript, page 3, paragraph 11.

"Which said *order* and the things done thereunder was in violation of Sec. 4, Art. I., of the Constitution of the United States," etc.

Now clearly such a case as this — the decision of a Court or order made by a Court — was not within the contemplation of the provision. Else no case at all could be disposed of without coming within such inhibition.

If a man who entered into a contract according to and following the supposed meaning of some law should find that law construed to have a different meaning than he had assumed, then he could go into the Federal Court upon the ground that the state through its officers had "impaired the obligation of his contract" by rendering a decision which affected it to his loss. Or should this litigant be successful, the defeated one would have the same right to complain because such decision impaired the obligation of his contract by not recognizing his prior right, etc.

Railroad vs. Rock, 4 Wall. 177.

That such *order* or *decision* about or concerning a law is not the *passing* or the enactment of a law and is not within the constitutional inhibition, has often been held by this Court.

As early as *Commercial Bank v. Buckingham, 5 How. 317–18*, in 1847, this Court said:

"It is the peculiar province and privilege of the state courts to construe their own statutes, and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense of

their judgments having impaired the obligation of contracts. The power delegated to us is for the restraint of *unconstitutional legislation* by the state and not for the correction of alleged errors by their judiciary."

This rule was re-affirmed in

Railroad vs. Marshall, 12 How. 165.

and again in

Lawler vs. Walker, 14 How. 149–154.

The doctrine was clearly asserted in

R. R. Co. vs. Rock, supra,

Mr. Justice Miller saying:

"In the argument of counsel before us no attempt is made to show that any provision of the Constitution of the State of Iowa conflicts in any way with the Constitution of the United States. The whole case in the language of the brief, is put upon the ground that the Supreme Court of Iowa has made a decision in this case which impairs the obligation of contracts; and the argument goes upon the fundamental error that this court can as an appellate tribunal reverse the decision of the state court, because that court held a contract to be void which this court might hold to be valid. If this were the law every case of a contract held by the state court not to be binding for any cause whatever can be brought to this court for review, and we should thus become the court of final resort in all cases of contract where the decisions of state courts were against the validity of the contracts set up in those courts.

"This obviously was not the purpose of the judiciary act. It must be the Constitution or *some law of the state* which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States. * * * No such thing appears in the case before us, which is the case of a citizen of Iowa suing a corporation of Iowa in the Iowa Courts, their rights being determined either upon a construction of a local law in no way in conflict with the Federal Constitution, or else upon a single question of fraud."

Followed:

Railroad vs. McClure, 10 *Wall.* 511.

In *Knox vs. Bank*, 12 *Wall.* 379-80.

say the court:

We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because their judgments in their effect impair the obligation of contracts. If we did, every case decided in a state court could be brought here where the party setting up a contract alleged that the court had taken a different view of its application to that which he held."

Also *Murdock vs. Memphis*, 20 *Wall.* 590.

These views found further affirmance in

Brown vs. Colorado, 106 *U. S.* 95.

"The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract valid

which in our opinion is void, or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this Court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating this jurisdiction, unless that judgment in terms or by its necessary operation gives effect to some provision of the State Constitution or some legislative enactment of the state which is claimed by the unsuccessful party to impair the obligation of the particular contract in question."

Lehigh Water Co. v. Easton, 121 U. S. 388.

Again in

New Orleans Water Works vs. Company, 125 U. S. 30.

"In order to come within the provision of the Conatitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract have been impaired, *but it must have been impaired by a law of the state.* The prohibition is aimed at the legislative power of the state and *not at the decisions of its Courts.*"

The same doctrine is asserted in

Morrow vs. Brinkley, 129 U. S. 178.
Texas & P. Ry. Co. vs. Southern Pacific, 137 U. S. 48.
Cook County vs. Canal Co., 138 U. S. 635.
St. Paul Road vs. Todd County, 142 U. S. 282–287.

"The position of the state was not that the lands in question were rendered taxable by any *law* passed subsequent to the company's charter, but under the terms of the contract itself the the land was not taxable. No *subsequent law* is referred to upon which the opinion of the court proceeded. On the contrary the law was the same so far as any question arising here is concerned.

Later in *Brown vs. Smart*, *145 U. S. 454*, say the Court:

"The position taken . . . that the obligation of a contract with him has been unconstitutionally impaired, is clearly untenable, *because the statute and the state was in existence when the contract was made, and the subsequent decision of the Court of Appeals was not a law within the meaning of the Constitution, which declares that no state shall pass any law impairing the obligation of contracts.*"

Wood vs. Brady, *150 U. S. 18.*

But in the latest announcement by this court, in

Central Land Co. vs. Laidlaw, *159 U. S.* (*S. C. 16 Supreme Court Reporter p. 80, Oct. Term, 1895.*)

The court after further reference to the general cases and full quotations from the same say, under facts quite similar to those in the case at bar:

"In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of a contract, not only must the obligation have been impaired by some act of the legislative power of the state, and not by a decision of its judicial power only.

"The jurisdiction of this court . . . can be in-

voked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by a State Court to be valid, and not when an act admitted to be valid has been misconstrued by the Court.

"When the facts have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the meaning of the fourteenth amendment to the Constitution of the United States."

The case cited would seem to be conclusive of the present case.

It has been decided in this very cause at bar by the highest Court of the state, that no such contract rights as are claimed were granted under the law.

Hanford vs. Davies et al., 1 Wash. St. 476.

An unreversed judgment of a Circuit (or nisi prius) Court is not a nullity and cannot be collaterally attacked."

Cutler vs Huston, 158 U. S. 423.
Michaels vs. Post, 21 Wall. 398.
Chapman vs. Brewer, 114 U. S. 158.
Navigation Co. vs. Iowa Homestead Co., 123 U. S. 552.
Dowell vs. Applegate, 152 U. S. 327.

III.

That the Probate Court in the proceedings complained of resulting in a sale to the Respondent Davies had jurisdiction, seems to be not open to doubt.

The law prescribing the jurisdiction and regulating

the practice of the Probate Court of Washington Territory was adopted as early as 1873, (Laws 1873, pp. 252 and following) and so far as the present questions are concerned is continued unchanged in the Code of 1881, (Sections 1297 and following). Our references below are to the Code of 1881.

Section 1299 provides: "The Probate Court shall have and possess the following powers: (1) *Exclusive* original jurisdiction within their respective counties in all cases relative to the probate of last wills and testaments. (2) The granting of letters testamentary and of administration, and revoking the same . . . (6) To allow or reject claims against estates of deceased persons as hereinafter provided. . . . (8) Said Court shall provide and keep a suitable seal, . . . and shall be a court of record.

"Section 1340. Wills shall be proved and letters testamentary or of administration shall be granted . . . (3) In the county in which any part of his estate may be, he having died out of the Territory and not having been a resident thereof at the time of his death."

Section 1348 provides for the probate of foreign wills.

Section 1388 directs administration to be granted (1) to the surviving husband or wife; (2) to certain of his relatives; (3) to the principal creditors: "Provided that if the persons so entitled shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives or next of kin . . . or if there be no principal creditor or creditors, then the Probate Court

may appoint any suitable and competent person to administer such estate."

Chapter CV. Secs. 1486 to 1527 provides for the sale of the real and personal property of decedent to pay claims and expenses.

The Supreme Court of the State of Washington in a cause drawing in question the validity of the very sale complained of in this suit and between the same parties, held that the administration upon the estate of Lumley Hall alleged in the complainant's bill, was a valid administration; that the sale of the real estate was a proper and valid sale; and that even had there been no taxes and no debts, still administration was necessary to settle the title to the realty.

Hanford vs. Davies, 1 Wash. St. 476.

This case was approved and followed in *Balch vs. Smith, 4 Wash. St. 497*, and is the settled law of the state.

The jurisdiction of the Probate Court, conferred by the statute quoted above, though limited was not inferior. It was a court of record, and upon the subject of administration and settlement of the estates of decedents its jurisdiction was originally exclusive. Its determination of the facts necessary to call its powers into action was the exercise of jurisdiction, and its conclusion cannot be attacked collaterally as is sought to be done by the plaintiff's bill.

Grignon's Lessee vs. Astor, 2 How. 319.

In this state, as in the case last cited, sales of real estate by the Probate Court are *in rem.*

Ackerson vs. Orchard, 7 Wash. 377.
In re Wilbur's Estate, 8 Wash. 41.
Ryan vs. Ferguson, 3 Wash. 356.

As further illustrating the questions here urged we cite:

Cutler vs. Huston, 158 U. S. 423.
Evers vs. Watson, 156 U. S. 527.
Michaels vs. Post, 21 Wall. 398.
Chapman vs. Brewer, 114 U. S. 158.
Des Moines Nav. Co. vs. Iowa Homestead Co., 123 U. S. 552.
Dowell vs. Applegate, 152 U. S. 327.

We respectfully submit, thereford, that the judgment should be affirmed.

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